

No. 91-2051-CFX
Status: GRANTED

Title: South Dakota, Petitioner
v.
Gregg Bourland, etc., et al.

Docketed:
June 19, 1992

Court: United States Court of Appeals for
the Eighth Circuit

Counsel for petitioner: Barnett, Mark W.

Counsel for respondent: McElroy, Scott, Greene, Bruce,
Clark, Krista, Solicitor General, Emery, Steve,
Lenzini, Paul, Shilton, David, Linsheid, Steven,
Tribe, Laurence

Ptn mailed 6-19-92, see mail label re dkt dt. 10
corr'd copies of pet rec'd 081192-error p. 6

Entry	Date	Note	Proceedings and Orders
1	Apr 24 1992	D	Application (A91-787) for a stay of mandate of CA pending timely filing and disposition of petition for writ of certiorari, submitted to Justice Blackmun.
2	Apr 25 1992		Application (A91-787) denied by Justice Blackmun.
3	Jun 19 1992	G	Petition for writ of certiorari filed.
4	Jun 19 1992		Appendix of petitioner filed.
6	Jul 10 1992		Order extending time to file response to petition until August 5, 1992.
7	Jul 20 1992		Brief amicus curiae of International Assn. of Fish and Wildlife Agencies filed.
8	Jul 20 1992		Brief amici curiae of Montana, et al. filed.
9	Jul 29 1992		DISTRIBUTED. September 28, 1992
10	Aug 6 1992	X	Brief of respondent Gregg Bourland, et al. in opposition filed.
11	Aug 14 1992	X	Reply brief of petitioner filed.
12	Oct 5 1992		Petition GRANTED. *****
20	Nov 9 1992		Record filed.
		*	Partial proceedings United States Court of Appeals for the Eighth Circuit.
18	Nov 18 1992		Joint appendix filed.
19	Nov 18 1992		Two Volumes
13	Nov 19 1992		Brief amici curiae of Corson County, South Dakota, et al. filed.
14	Nov 19 1992		Brief amici curiae of Montana, et al. filed.
15	Nov 19 1992		Brief amicus curiae of International Assn. of Fish and Wildlife Agencies filed.
22	Nov 19 1992		Brief of petitioner South Dakota filed.
21	Nov 20 1992		Record filed.
		*	Original proceedings United States District Court for the Central Division of South Dakota (3 Boxes)
23	Dec 7 1992	G	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
24	Dec 14 1992		Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided

2/92

No. 91-2051-CFX

Entry	Date	Note	Proceedings and Orders
			argument GRANTED.
25	Dec 21 1992		Brief of respondents Greg Bourland, et al. filed.
26	Dec 21 1992		Brief amici curiae of Standing Rock Sioux Tribe, et al. filed.
27	Dec 21 1992		Brief amicus curiae of United States filed.
28	Dec 28 1992		SET FOR ARGUMENT TUESDAY, MARCH 2, 1993 (2ND CASE).
29	Jan 4 1993		CIRCULATED.
30	Jan 25 1993	X	Reply brief of petitioner filed.
31	Feb 22 1993		LODGING by petitioner. Twelve copies of Revision of Article VII, Section 2 of By-Laws of the Cheyenne River Sioux Tribe.
32	Feb 22 1993		Record filed.
		*	Exhibit 95 received from United States District Court, District of South Dakota (Map in tube)
33	Mar 2 1993		ARGUED.

91-2051

NO. ____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

STATE OF SOUTH DAKOTA IN ITS OWN
BEHALF, AND AS PARENS PATRIAE,

Petitioner,

v.

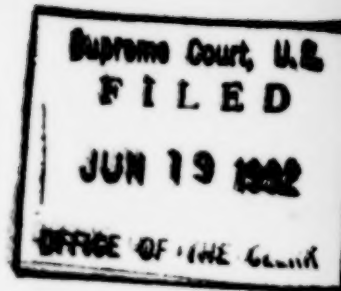
GREGG BOURLAND, PERSONALLY AND AS CHAIRMAN
OF THE CHEYENNE RIVER SIOUX TRIBE AND
DENNIS ROUSSEAU, PERSONALLY AND AS DIRECTOR
OF CHEYENNE RIVER SIOUX TRIBE
GAME, FISH AND PARKS,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATE COURT OF APPEAL
FOR THE EIGHTH CIRCUIT

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QUESTION PRESENTED

DOES THE CHEYENNE RIVER SIOUX TRIBE HAVE
AUTHORITY TO REGULATE NON-INDIANS HUNTING AND
FISHING ON LANDS AND OVERLYING WATERS
ACQUIRED IN FEE BY THE UNITED STATES FOR
CONSTRUCTION AND OPERATION OF THE OAHE
RESERVOIR WITHIN THE TRIBE'S RESERVATION
UNDER THE FLOOD CONTROL ACT OF 1944 AND THE
1954 CHEYENNE RIVER ACT?

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IN THE
SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1991

STATE OF SOUTH DAKOTA IN ITS OWN
BEHALF, AND AS PARENS PATRIAE,

Petitioner,

v.

GREGG BOURLAND, PERSONALLY AND AS CHAIRMAN
OF THE CHEYENNE RIVER SIOUX TRIBE AND
DENNIS ROUSSEAU, PERSONALLY AND AS DIRECTOR
OF CHEYENNE RIVER SIOUX TRIBE
GAME, FISH AND PARKS,

Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

The petitioner State of South Dakota
respectfully prays that a writ of certiorari
issue to review the judgment and opinion of
the United States Court of Appeals for the

Eighth Circuit, entered in the above entitled proceeding on November 21, 1991.

OPINIONS BELOW

The opinion of the Eighth Circuit Court of Appeals appears at 949 F.2d 984 (8th Cir. 1991) and is printed in the Appendix at A-1. The opinion of the District Court on the merits is unreported and is printed in the Appendix at A-56. The Memorandum Opinion of the District Court denying a Preliminary Injunction is printed in the Appendix at A-161. The Memorandum Opinion of the District Court denying a Motion to Dismiss is set in the Appendix at A-217. The Temporary Restraining Order issued by the District Court is printed in the Appendix at A-180.

JURISDICTIONAL STATEMENT

The Judgment of the Eighth Circuit Court of Appeals was entered on November 21, 1991. Appendix at A-52 to 54. The Petitioner's Petition for Rehearing and Suggestion for

Rehearing En Banc were denied on March 23, 1992. Appendix at A-55. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

TREATY AND STATUTORY PROVISIONS

Flood Control Act of 1944, Pub. L. 534, 58 Stat. 887 (1944), Section 4. Appendix at A-185.

Pub.L. No. 870, 64 Stat. 1093 (1950). Appendix at A-187.

Cheyenne River Act of 1954, Pub.L. No. 776, 68 Stat. 1191 (1954). Appendix at A-195.

STATEMENT OF THE CASE

This is a hunting and fishing controversy with broad policy and practical implications. The jurisdiction of the district court was invoked under 28 U.S.C. § 1331, 1343(4) and 1337.

1. Decision below.

In the decision below, the Court of Appeals found that an Indian tribe could exercise civil regulatory jurisdiction over non-Indians on approximately one-hundred thousand acres of fee land and overlying waters taken from Indians by the United States for construction and operation of the Oahe Reservoir under the Cheyenne River Act, Pub. L. No. 776, 68 Stat. 1191 (1954).¹ In

¹The District Court below applied Montana v. United States, 450 U.S. 544 (1981) and found that the Tribe did not have civil regulatory jurisdiction over nonmembers in the taken area. Following a comprehensive survey of the evidence produced at a six day trial the Court concluded that the "tribe need not regulate hunting and fishing activities of nonmembers on the taken area. . . to protect its political integrity, economic security or health and welfare." District Court Opinion, A-89. The Court of Appeals did not undermine this factual determination. The District Court also found, pursuant to the opinion of Justice Stevens in Brendale, that the taken area was

(Footnote Continued)

rendering its decision, the Court of Appeals pointedly refused to rely upon this Court's decisions involving tribal civil regulatory jurisdiction over non-Indians on fee land: Montana v. United States, 450 U.S. 544 (1981) and Brendale v. Confederated Bands and Tribes of the Yakima Nation, 492 U.S. 408 (1989).

(Footnote Continued)

not a "pristine area" and that the tribe had never denied nonmember access or even monitored such access. Id. at A-87. The District Court held that the tribe had not shown any "unique cultural, spiritual, or religious significance attaches to the taken area. . . ." Id. at A-87. The Court of Appeals seems to have agreed with this finding. See, Circuit Court Opinion, A-45, 46. (applying this finding to the taken area acquired from non-Indians).

Other holdings of the District Court are not at issue here. The District Court found that the tribe did not have civil regulatory jurisdiction over non-Indians on the main body of the reservation (other than the taken area); the tribe did not appeal this portion of the decision. In addition, the District Court also found that the reservation had not been diminished by the 1954 Taking Act; the State did not appeal this portion of the decision.

Circuit Court Opinion, A-26 and 27, A-39, A-41 at n.18. Instead, the Court of Appeals analyzed the jurisdictional issue principally in terms of United States v. Dion, 476 U.S. 734 (1986) a case involving abrogation of treaty rights granted to Indians under the general authority of the 1944 Flood Control Act, Pub. L. No. 534, 58 Stat. 887 (1944). Circuit Court Opinion, A-40. Applying that standard, the Court of Appeals concluded that the Tribe "retains" civil regulatory authority over non-Indians on the federally owned fee land because Congress had not, in acquiring this land from Indians in fee, expressly considered the conflict between its actions and Indian treaty rights and had not expressly abrogated the treaty right. Circuit Court Opinion, A-40 and 41.

The Court of Appeals also found that the tribe could potentially exercise civil regulatory jurisdiction over non-Indians on

approximately 18,000 acres of fee land and overlying waters taken from non-Indians by the United States for construction of the reservoir. The Court of Appeals indicated that such tribal jurisdiction would exist on the federal fee lands if either of the two Montana exceptions were present. These exceptions relate, of course, to consent of the non-Indians and to conduct of the non-Indians which threatens or has some direct effect on the political integrity, the economic security or health or welfare of the tribe. Circuit Court Opinion, A-46, n.20 (quoting Montana v. United States, 450 U.S. at 1258.) The Court of Appeals also implied that the District Court on remand should find that the tribe could have jurisdiction over non-Indians on the fee lands of the United States if the original acquisition of the lands by the non-Indians (prior to conveyance of the lands to the United States) had not

been "pursuant to an allotment act." Circuit Court Opinion, A-45, n.19. Consistent with the remainder of its decision, the Court of Appeals apparently meant for there to be a Dion style analysis of any non-Allotment act fee lands.²

²The tribal respondents did not, in this litigation, challenge the state's authority to also exercise jurisdiction over non-Indians in the "taken area" although, of course, they were well aware of the States enforcement activity. Indeed, the Tribe successfully resisted the states contention that the issue of state authority over non-Indians had been properly raised. See, District Court Opinion, A-116 to 118. See also, Court of Appeals Opinion at A-20, n.13. As a result, if the tribal respondents prevail in the present litigation, the stage is set for further litigation, presumably brought by the Tribe or some other person on entity, to challenge the viability of the state's exercise of concurrent jurisdiction in the "taken area" in the hunting and fishing context. See generally, United States v. Montana, 604 F.2d 1162, 1171 (9th Cir. 1971) reversed, Montana v. United States, 450 U.S. 544 (1980).

It should also be noted that the Court of Appeals overturned the holding of the

(Footnote Continued)

2. Area immediately involved.

The area immediately impacted by the decision of the Court of Appeals includes approximately 100,000 acres of land and overlying waters acquired in fee by the United States in the 1950's from tribal members for construction and operation of the Oahe Reservoir on the Missouri River. See, 1954 Cheyenne River Act. The area also includes, as noted, approximately 18,000 acres acquired from non-Indians. 1944 Flood Control Act. The entire area is known as the "taken area" and constitutes the eastern boundary of the Cheyenne River Reservation which was created in 1889. A portion of the land acquired is flooded by the Oahe

(Footnote Continued)

District Court that the Tribe did not have civil regulatory jurisdiction over nonmember Indians. The Court of Appeals found that the issue had not been properly raised below. Court of Appeals Opinion, A-18 and 19.

Reservoir and a portion constitutes the shoreline of the Reservoir.

Since construction, the State has developed the Oahe Reservoir into one of the nation's premiere walleye fisheries, District Court Opinion, A-85; and has stocked the reservoir with over seventy-two million fish. Id. The Tribe has taken no part in the development of its fishery and admitted during trial that it had no plans to do so. See TT 506, 521, 839-840; See also, District Court Opinion, A-81, 83.

3. Legislative background.

In 1944, Congress determined to build a series of major reservoirs on the Missouri River. The two plans the "Pick Plan" and "Sloan Plan" were ultimately combined and adopted by Congress by the Flood Control Act

of 1944, Pub. L. 534, 58 Stat. 887 (1944);³ documents accompanying both, the Pick and Sloan Plans recognized that Indian lands would be impacted by the reservoirs. H.R. Doc. No. 475, 78th Cong., 2d Sess. (1944) (the "Pick Plan"), p.4-5; S.Doc.No. 191, 78th Cong., 2d Sess. (1944) (the "Sloan Plan"), p.5.

Legislation allowing negotiation of contracts between the U.S. Army Corp of Engineers and the Cheyenne River Sioux Tribe for lands needed for construction of the Oahe Reservoir was introduced in 1949. H.R. 5372, 1st Cong., 1st Sess. (1949). This bill would have provided for "preservation of treaty rights of the tribe. . . in regard to fishing, hunting, and trapping insofar as

³Lands acquired from non-Indians were acquired under the general authority of this Act. See Circuit Court Opinion, A-9.

practical under the physical conditions existing when the Oahe project is completed." This language was omitted, however, in the final version of Pub.L. No. 870. 64 Stat. 1094 (1950). Efforts to obtain a contract under the 1950 Legislation were unsuccessful, and the entire matter was again submitted to Congress in 1954. Legislation enacted in 1954 proposed an agreement with the Tribe (and later accepted by it). The 1954 Cheyenne River Act provided that the Tribe would convey to the United States "all tribal, allotted, assigned, and inherited lands or interests within the Cheyenne River Reservation belonging to Indians of said reservation. . . . subject, however, to the conditions of this agreement herein set forth. . . ." 68 Stat. 1191 (1954).

The Act carefully provided for substantial compensation for the taking of the land itself, and, in addition, for the

wildlife lost. The annual value to the tribe of the wildlife was estimated to be either \$36,600 or \$77,300. See Missouri River Basin Investigation Report No. 138 at 78 (April 1954). The higher amount was combined with other wild product loss and capitalized at four percent to come up with an ultimate claim of over \$1,857,500 in permanent wildlife and wild product loss to the Tribe. See H.R. 2484, 83rd Cong., 2d Sess. (1954); Ultimately the 1954 Cheyenne River Act provided compensation of \$5,384,014 for land loss, grazing loss, wildlife loss, loss of the bed of the river and other items. 68 Stat. 1191. Additional compensation of \$5,160,000 was provided for "rehabilitation" of the Tribe and its members. 68 Stat. 1192. Furthermore, the Act provided for certain privileges for the Tribe after the taking. Most of the privileges or rights set out in the legislation are exercisable only on the

shoreline. Thus, for example, members of the Tribe were provided the right to remove timber and to remain on and use the taken lands until the gates of the dam were closed. The legislation also provided that the Tribe could graze stock on the unflooded area including land previously held in fee by non-Indians. See 68 Stat. 1192-93.

The Tribe was also provided "all mineral rights . . . within the taking area" 68 Stat. 1192, a right presumably exercisable below the water of the new reservoir. The only right contained in the 1954 Cheyenne River Act which is readily⁴ applicable on the water

⁴Grazing cattle, of course, could in some instances use the water of the reservoir.

itself appears in 68 Stat. 1193 at Section X⁵ as follows:

Tribal council and members of said Indian tribe shall have, without cost the right of free access to the shoreline of the reservoir including the right to hunt and fish in and on the aforesaid shoreline reservoir, subject, however, to regulations governing the corresponding use by other citizens of the United States. (Emphasis added.)

The 1954 Cheyenne River Act, including Section X and the \$10 million compensation, was ultimately accepted by 92% of voting tribal members.

⁵While the Court of Appeals hinted at an analysis which relied upon "retained" rights of the Tribe in the lands of the "taken area," it did not develop that analysis or apply it discretely to the land and water on which different rights were said to be "retained." See Circuit Court Opinion A-36 and 37.

4. Subsequent History.

Subsequent to closing of the reservoir and transfer of the land in fee to the United States, the State of South Dakota has managed the Oahe Reservoir fishery. The State had stocked about seventy-two million fish in the developed reservoir from 1970 through the time of trial in 1988. District Court Opinion, A-85; Exhibit 114. Further, the State has conducted scores of fish surveys, species composition surveys, reproduction studies and studies on the introduction of fish. See, e.g. District Court Opinion, A-85 to 86; See also TT 31-32, 75, 93-96, 102-106, 230. Critically, South Dakota regularly enforced its hunting and fishing laws against non-Indians throughout the "taken area" on both the shoreline and upon

the waters of the Missouri River itself.⁶ District Court Opinion, A-85; 86; PH 127, 144-146, TT 433, 442, 444, Exhibit 140.

⁶See n.2, supra. The District Court made a general finding that the tribe "enforced its [hunting and fishing] regulation against all violators" on the lands in dispute. District Court Opinion A-73. The Court, however, made no findings in this opinion as to the frequency, vigor or manner of the tribal enforcement. (See, as the low level of tribal activity, District Court Memorandum Opinion which denied a preliminary injunction, at A-171). Moreover, the District Court's ultimate finding was that the tribe need not regulate hunting and fishing activities on the taken area. . . . to protect its political interiority, economic security or health or welfare." District Court Opinion A-89. In this regard, it is also of note that the tribal chairman admitted that the Tribe had never brought a civil or criminal enforcement proceeding against any non-Indian for hunting and fishing activity on the reservation, including necessarily the taken area, prior to this litigation. See TT 548-549, see also TT 517; see also Exhibit 284. The Court of Appeals did not analyze these District Court's findings, nor did it adjudge the appropriate weight to be given them, if any, in a Montana-Brendale analysis presumably because its principal analysis was based on United States v. Dion, as set forth below.

Through South Dakota's management the Oahe walleye fishery has been developed into an asset with a national reputation. District Court Opinion, A-85. TT 100-101. The State has also developed a nationally known salmon fishery where none existed before. TT 36; see District Court Opinion, A-85.

The Tribe, in contrast, has essentially ignored the Missouri River throughout its history. As a BIA researcher has stated in Lawson, Reservoir and Reservation: the Oahe Dam and the Cheyenne River Sioux, 37 S.D. Historical Collections 102, 158 (1974):

Though the river contained a wide variety of fish, the Indians never learned to exploit this food source and forms of water recreation such as swimming and boating were also uncommon activities.

Similarly, Senate and House reports compiled in the 1940's and 1950's made it clear that:

Fishing is not important on either reservation at this time.

S.R. No. 1737, 81st Cong., 2d Sess. 1954 p. 5. See also, H.R. No. 1047, 81st Cong., 1st Sess. (1948), p. 4. At the time the litigation was commenced the Tribe had never done any stocking of fish on the Missouri River, had never done fish surveys, species composition surveys or reproduction surveys on the Missouri River, and had no docks or ramps going to the Missouri River. TT 506, 521. See also, District Court Opinion, A-81. The Tribe presently a "Wildlife Management Plan" to the District Court at trial but even this plan failed to include any Missouri River fish developement. TT 839-840. The Tribe admitted that it had no plans for development of the Missouri River at the time of trial of this matter. TT 506, 521, 839-840.

REASON FOR GRANTING THE WRIT

THE DECISION OF THE COURT OF
APPEALS CONFLICTS WITH OPINIONS OF
THIS COURT.

A. Lands acquired from Indians.

1. The Court of Appeals decision with regard to lands acquired from Indians conflicts with Montana and Brendale.

In Montana, this Court considered whether a tribe could exercise civil regulatory authority for hunting and fishing purposes over non-Indians on fee lands taken under the General Allotment Act and the Crow Allotment Act. The Court considered two potential "sources" for the tribal regulatory power--treaties and inherent sovereignty. With regard to a treaty right, this Court stated that the 1868 Treaty had "arguably conferred upon the Tribe the authority to control fishing and hunting on those lands." 450 U.S. at 558-559. The Court held,

however, that this "arguable"⁷ authority could extend only to land on which the Tribe exercises "absolute and undisturbed use and occupation." 450 U.S. at 559.

Because the tribe did not have "absolute and undisturbed use and occupation" of the land taken as a result of the General Allotment Act, the power arguably created or reserved under the 1868 Treaty to restrict or prohibit non-Indian hunting or fishing on the reservation "cannot apply to lands held in fee by non-Indians." Id.

Thus, to determine whether a treaty right even arguably applies to a particular

⁷ Montana does not hold, of course, that a treaty right to exclude can be translated into a treaty right to regulate; Montana suggests only that this proportion is an "arguable" one. It is more consistent with both Montana and Brendale to find a tribal right to regulate only when the non-Indian expressly or implicitly consents to tribal regulation.

parcel of fee land on the reservation the question to be asked is whether the tribe at the present moment exercises "absolute and undisturbed use and occupation." 450 U.S. at 559. When it does not, Montana requires a finding that no treaty right exists to regulate non-Indians on the land in question.

Second, Montana examines whether the Tribe has inherent power to regulate non-Indians in the particular situation at issue. According to Montana, the Tribes' remaining inherent powers are those relating only to internal relations or to "relations among members of a tribe." 450 U.S. at 564, quoting United States v. Wheeler, 435 U.S. 313, 326 (1978).

According to this Court, the "exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot

survive without express congressional delegation." 450 U.S. at 564.

Montana thus establishes a general rule for determining whether a tribe may have jurisdiction over non-Indians, a rule which carefully takes into cognizance both treaty rights and inherent rights.⁸

⁸Montana also suggested two possible exceptions to its general rule. The first exception, relating to "consensual relations" which give rise to tribal regulatory jurisdiction over nonmembers, plainly does not exist here. The second exception, relating to the potential existence of tribal civil regulatory jurisdiction over a nonmember when the action of the nonmember has a particular "direct effect" on the tribe or its members, was rejected by the four Justice plurality in Brendale which held that certain nonmember activities could give rise to federal court, not tribal court jurisdiction. 492 U.S. at 431.

It is also worthy of note that the District Court found that the Montana "direct effect" exception did not apply in this case when it found that the Tribe "need not regulate the hunting and fishing activities of nonmembers on the taken area . . . to protect its political integrity, economic

(Footnote Continued)

Similarly, the four Justice plurality in Brendale treats the "right to exclude" and "inherent sovereignty" as the basis of the tribal argument to regulate nonmembers on a reservation. The four Justice plurality stated, as to the treaty right argument, that the Court in Montana had:

flatly rejected the existence of power, derived from the power to exclude, to regulate activities on lands from which tribes can no longer exclude nonmembers.

492 U.S. at 424.

The four Justice plurality in Brendale also rejected the claim relating to "inherent sovereignty" because this concept could be

(Footnote Continued)
security or health or welfare." District Court Opinion A-35. In any event, as noted above, the critical point is that the Eighth Circuit Court of Appeals did not rely on the rule of Montana or Brendale, or any exception to the rule of those cases.

properly applied only to the tribes "internal relations":

Regulation of "the relations between an Indian tribe and nonmembers of the tribe" is necessarily inconsistent with a tribe's dependent status, and therefore tribal sovereignty over such matters of "external relations" is divested."

492 U.S. at 427 quoting, United States v. Wheeler, 435 U.S. 313, 326 (1978). The four Justice plurality in Brendale thus found that even when the claims of treaty rights based on the power to exclude and inherent sovereignty failed, the Tribe and its members still had a remedy in federal court against the actions of a non-Indian when his actions were "demonstrably serious" and in fact imperiled the tribe.

Finally the pivotal opinion of Justices Stevens and O'Connor in Brendale, finds:

the proper resolution of these cases depends on the extent to which the Tribe's virtually absolute power to exclude has

either been diminished by federal statute or voluntarily surrendered by the Tribe itself.

492 U.S. at 433 (emphasis added).

The Court of Appeals, however, refused to apply Montana-Brendale, effectively limiting that the rule of these cases to Allotment Act situations. Circuit Court Opinion, A-26 and 27; A-39, A-41 at n.18. Of course, a footnote in Montana does cite to the special characteristics of the Allotment Act itself, stating:

It defies common sense to suppose that Congress would intend that non-Indians purchasing allotted lands would be subject to tribal jurisdiction when an avowed purpose of the allotment policy was the ultimate destruction of tribal government.

450 U.S. at 559 n. 9. The Montana footnote, however, is but an answer to the Court of Appeal's view in Montana that the Allotment Acts actually supported tribal jurisdiction. Id. This Court appropriately found that

precisely the opposite was true. The footnote, moreover, continues, stating "what is relevant is the effect of the land alienation occasioned by that policy on Indian treaty rights" 450 U.S. at 559 n.9 (emphasis added). The Court thus emphasized that it is the alienation of land itself, (and not the means of alienation) and the consequent loss of the power to exclude, which preclude a finding that the treaty power allows regulation of nonmembers on the area involved.

By spurning a Montana-Brendale analysis, the Court of Appeals' decision clearly conflicts with decisions of this Court.⁹

⁹If the appropriate analysis had been made, the Court of Appeals would have concluded that the Tribe had no right to regulate non-Indians on the federally owned fee land. First, it is clear that no right to exclude exists on this land. Section 4 of (Footnote Continued).

2. The Court of Appeals erred failing to find that the 1954 Taking Act was the equivalent to the Allotment Acts under Montana-Brendale.

(Footnote Continued)

the Flood Control Act of 1944, Pub. L. 534, 58 Stat. 889 (1944) § 4, 16 U.S.C. § 460d requires that the "water areas of all such projects will be open to public use generally," The 1954 Cheyenne River Act, 68 Stat. 1193, provides that the tribes "right to hunt and fish in and on the shoreline and reservoir [is] subject, however, to regulations governing the corresponding use by other citizens of the United States. (emphasis added). Thus, the tribe could not, consistent with this legislation exclude nonmembers or non-Indians from the "taken area." The Court of Appeals found, in fact, that the Tribe was not "free entirely to exclude non-Indians" from the taken area even under its incorrect decision. Circuit Court Opinion, A-42. Thus no treaty right exists in this case.

Further, the entire issue is one regarding the "external relations" of the Tribe with nonmembers; the tribe has been deprived of this jurisdiction as a result of its dependent status. According to the plurality opinion of Justice White in Brendale, the Tribes' only remedy is an action in federal court. Thus the tribe has no civil regulatory jurisdiction over nonmembers on any non-Indian fee land in this case because it may not exclude non-Indians from the land and because the matter is one involving the tribe's "external relations."

The 1954 Taking Act at issue clearly contemplated the eventual elimination of tribal government and was thus the functional equivalent of the Allotment Acts cited to in Montana and Brendale. The Court of Appeals below erred in failing to so find.¹⁰

The Cheyenne River Taking Act was enacted in 1954. Just one year earlier, Congress had enacted H.R. Con. Res. 108 which stated that the policy of Congress was "as rapidly as possible" to subject the Indians to the "same privileges and responsibilities as are applicable to other citizens of the United States, [and] to end their status as wards of the United States. . . ." See

¹⁰The Court of Appeals seems not to have squarely considered whether the 1954 Cheyenne River Act was the equivalent of the allotment acts, through the point was effectively raised before that Court. See Circuit Court Opinion, A-9, n.7.

Washington v. Confederated Bands and Tribes of the Yakima Indian Nation, 439 U.S. 463, 488 n.32 (1979). According to this Court, this "policy reflected a return to the philosophy of the General Allotment Act of 1887" Id. The 1954 Cheyenne River Act was clearly part of the effort in the early 1950's through the late 1960's to terminate the reservations in accordance with the resurgent General Allotment Act philosophy, as is demonstrated by the legislative history. Representative Berry, arguing for adoption of the 1954 Cheyenne River Act, directly tied the Act to other legislation "which will terminate the federal supervision over six groups of Indians. . . ." ____ Cong. Rec. 13160 (Aug. 3, 1954). Likewise, the Department of the Interior, in its letter of March 19, 1954, printed at H.R.Rep.No. 2484, 83rd Cong., 2d Sess. (1954), at 13, describing

facilities to be provided to the Indians stated:

During this period of time [six to eight years] the situation of the Indians may change appreciably, particularly in view of the national policy of terminating special Federal services of a public nature to Indians by transferring responsibility for such services to the States and their local subdivisions. (Emphasis added)

Indeed, the Tribe itself, in its "Memorial to the 83d Congress," stated that:

We are convinced that we have set out fully and we think we have shown conclusively that the Sioux Tribe of the Cheyenne River Reservation should be placed on a position to take over their own affairs and ultimately released as wards of the United States. The pending Oahe bills, as introduced, should be passed by Congress.

Memorial, supra, at 35. Thus, assuming that Montana-Brendale require that an act be part of a termination drive to allow application of the rule of these cases, the 1954 Taking

Act meets that requirement and the Court of Appeals erred in concluding otherwise.

3. The Court of Appeals erred in applying the reasoning of the United States v. Dion to lands acquired from Indians instead of applying the reasoning of Montana and Brendale.

The Court of Appeals erroneously applied the standards for treaty abrogation with regard to rights of tribal members to this case which, in fact, involves the rights of nontribal members. As discussed above, the Montana-Brendale doctrine governs the issue of tribal regulatory jurisdiction over non-Indians on fee land on the reservation.

In neither Montana nor Brendale did this Court demand a showing that Congress had "actually considered" the conflict between a treaty provision and its intended action; rather the issue was whether, following the transfer of land, the Tribe had "'absolute and undisturbed use and occupation,'" of the

land and whether the matter involved the internal relations of the Tribe. Montana, 450 U.S. at 559, 564; Brendale, 492 U.S. at 424, 427 (opinion of Justice White); see also 492 U.S. at 433 (opinion of Justice Stevens); 492 U.S. at 448 (opinion of Justice Blackmun)

In contrast, United States v. Dion, 476 U.S. at 739-740 requires a conscious plan on the part of Congress to abrogate a treaty right, in particular the right to hunt eagles, belonging to tribal member and exercisable by him. The focus in Montana and Brendale is on the effect of the congressional action on the authority of the tribe over a non-Indian; in Dion the focus is on whether Congress had actually considered and accomplished the abrogation of a treaty right exercisable by an Indian. This case accordingly provides an opportunity for this Court to set out the appropriate application of Dion, on the one hand, and

Montana-Brendale, on the other, to situations involving land no longer in Indian ownership on the reservation.¹¹

4. The Court of Appeals decision below unduly restricts the language of Dion.

Even assuming arguendo applicability of Dion to the rights of nonmembers on lands taken in fee by the United States, the circuit court misapplied Dion. Dion requires actual consideration of a conflict between treaty rights and its intended action. 476 U.S. at 740. In Dion, such consideration was demonstrated by the specific language of the

¹¹It is notable that Dion and Montana-Brendale have proceeded on separate tracks. Dion did not cite Montana although Montana had itself been decided five years earlier. Brendale did not cite Dion although Dion had been decided for three years at the time the Brendale opinion was rendered. Indeed, none of the three opinions in Brendale mentions Dion, which is additional evidence of the conflict of the Court of Appeals with the jurisprudence of this Court.

Eagle Protection Act which allowed the taking of eagles "for the religious purposes of Indian tribes" 476 U.S. at 740. The requisite language is also contained in the Act at issue here and the Court of Appeals erred in interpreting the Act otherwise. In the 1954 Taking Act, the extent of the rights of tribal members to hunt and fish remaining after the Act was set out specifically in Section X of Public Law 776. Congress provided in Section X that members of Tribe would have without cost only the right of "free access" to the shoreline and reservoir "including the right to hunt and fish"; this right was specifically made subject to regulations "governing the corresponding use by other citizens of the United States."

The tribal right remaining after the 1954 Taking Act was merely a right of "access" to "hunt and fish," not a right to regulate others. Furthermore, the

specification of the remaining right in Section X evidences that Congress had actually "considered" the conflict between treaty rights and its intended action and had "resolved" the issue against the Tribe pursuant to Dion. Therefore, even if the 1954 Taking Act is assessed under Dion, -- which the State submits should not have been done--the Court of Appeals erred in its interpretation of the Act.

B. The Court of Appeals decision failed properly to apply Montana - Brendale to lands acquired from non-Indians.

As noted above, 18,000 acres of land was acquired for construction and operation of the Oahe Reservoir from non-Indians under the general authority of the 1944 Flood Control Act. The Court of Appeals did not reverse outright the holding of the District Court that the tribe had no jurisdiction over non-Indians on these lands, but did remand the issue to the District Court for

consideration of two factors. First, Court of Appeals suggested to the District Court that if it found that the lands had been originally acquired by non-Indians from Indians other than through "an allotment act" the analysis "may well be" that Montana did not apply to the cases. Circuit Court Opinion at A-45, n.19. Petitioner has demonstrated at length above that Montana-Brendale are not applied to Allotment Act cases alone, but to any lands owned or controlled by any person other than a tribal member. Thus the suggestion of the Court of Appeals and its implied direction to the District Court are erroneous.

Second, the Court of Appeals misapplied Montana-Brendale. The Court of Appeals found that if either of the two Montana exceptions does, in fact, apply, the result would be that the tribe "retains" regulatory authority over the non-Indian activity. Circuit Court

Opinion at A-46 n.20. Justice White in his plurality opinion in Brendale, however, made it clear that the second of the two Montana exceptions, i.e. that relating to impact of nonmember activity on the political integrity, economic security or health and welfare of the tribe, would give rise to federal court, not tribal court jurisdiction. 492 U.S. at 431. The opinion of the Brendale plurality gives proper respect to the case law of this Court commencing in 1809 when Justice Johnson, concurring in Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 147 (1809) stated that "[a]ll the restrictions upon the right of soil in the Indians, amount only to an exclusion of all competitors from their markets, and the limitation upon their sovereignty amounts to the right of governing every person within their limits except themselves."

Likewise, the Brendale plurality opinion appropriately puts the federal courts, and not the tribal courts, in the role of adjudicating disputes of the tribe involving its "external affairs." This is especially appropriate given the exclusionary nature of the tribal governments recently recognized in Duro v. Reina, 495 U.S. 676, 693 (1990). Finally, the Brendale plurality gives proper credence to tribal jurisdiction when appropriate, i.e., when the nonmember or non-Indian implicitly or explicitly consents to tribal jurisdiction.

C. This controversy has broad practical implications.

1. Federal lands.

The decision of the Court of Appeals in this instance has the potential to affect every fee holding of the United States within an Indian reservation made for public purposes. For example, acquisitions of land

from Indians for national parks, national monuments, waterfowl production areas, national forests, and reservoirs will not be governed by Montana-Brendale but rather the much more stringent standard set out in Dion if the acquisitions have not been filtered through an "allotment act."

For example, with regard to reservoir lands and overlying waters, it is estimated that beyond the acreage directly at issue here, there are an additional 100,000 to 200,000 acres of federal lands and overlying waters taken from Indians for Missouri River mainstem reservoirs on other reservations in North and South Dakota.¹² This includes area taken from the Standing Rock, Crow Creek, Lower Brule, and Fort Berthold reservations

¹²This estimate is based on the relative land areas involved.

for the Oahe, Big Bend and Garrison Reservoirs. These "taken areas" have in the past generally been regarded as public areas open to hunting and fishing by non-Indians with a state license only.¹³

National Grasslands also are important in certain western states. It is estimated that 20,000 acres of federally owned

¹³The Lower Brule "taken area," however, has been a subject of a five year settlement agreement which, inter alia, split jurisdiction between the state and tribe within the "taken area;" the agreement was judicially extended in relevant part through a preliminary injunction in recently filed litigation. See, L.B.S.T. v. S.D., Civ. No. 91-3036 (D.S.D.). A 1979 atlas produced by the Corps of Engineers for Lake Sharpe, which borders both the Lower Brule and Crow Creek Reservations, states: "Hunting and fishing is allowed on the lake and project land in accordance with the rules and regulations established by South Dakota Department of Game, Fish and Parks and the United States Fish and Wildlife Service." United States Army Corps of Engineers, Omaha District, Boating and Recreation, Lake Sharpe, Big Bend Dam, Chamberlain, South Dakota (Revised 5-79).

grasslands are found in the Grand River National Grassland in the southwest corner of the Standing Rock Reservation in South Dakota. See, U.S. Department of Agriculture, Forest Service Visitors Map, Grand River-Cedar River National Grasslands, North and South Dakota, Fifth Principal and Black Hills Meridian (1981). Again, non-Indians have hunted throughout the years with only a state license and have been subject to state, not tribal jurisdiction.

Furthermore, it is clear that thousands of acres of other federally owned fee land is found nationally in the form of national monuments on reservations (such as the Badlands National Monument found in part on the Pine Ridge Reservation in South Dakota), waterfowl production areas which are periodically opened to public hunting under state rules and regulations, national forests, and holdings of other agencies

including the Bureau of Land Management. See, e.g., South Dakota Department of Game, Fish and Parks, South Dakota Sportsman's Atlas, 1990.

The decision of the Court of Appeals has the potential to affect the analysis given to each of these pieces of land.

2. Non-federal lands.

Of equal concern is the potential impact of the decision of the Court of Appeals on lands acquired by non-Indians (or by the states) under acts other than the Allotment Act. The Court of Appeals did not identify any factor which would all its decision to be limited lands acquired by the United States itself and in fact suggested that non-Allotment Act lands held by non-Indians on reservations were not subject to a Montana-Brendale analysis. See Circuit Court Opinion at A-45, n.19.

There are, of course, a variety of non-Indian fee lands on the reservations which were not acquired through the Allotment acts. South Dakota estimates that over 750 miles of state roads are found within reservations in South Dakota alone; in an undetermined but substantial proportion of this mileage, the ownership or right of way was acquired other than through an allotment act. The mileage nationally is certainly significant. Just as the respondent tribe now is publicly asserting the authority to exercise civil regulatory jurisdiction to impose forfeiture and civil penalties on non-Indians on the federal lands and overlying water associated with the Oahe Reservoir, so this or other tribes may also attempt to exercise civil regulatory jurisdiction to impose such civil penalties on portions of highways which were taken into

fee or taken into easement status other than through an Allotment Act.

Similarly, rights of way acquired other than through an allotment act for railroads, telephone companies, oil and gas companies and other utilities on reservations are subject to the same claim. See, Burlington Northern Railroad Co. v. Blackfeet Tribe of the Blackfeet Indian Reservation, No. 91-545. (Petition for Certiorari pending).

In sum, it appears that significant parcels of land on reservations have passed into non-Indian hands through acts other than the Allotment Acts and that the problems raised by the circuit court's decision are, from the prospective of the states, likewise significant.¹⁴

¹⁴A recent case of this Court, County of Yakima v. Yakima Indian Nation, __ U.S. __, (Footnote Continued)

CONCLUSION

For the foregoing reasons the Petitioner respectfully requests that this Court grant the Petition for Writ of Certiorari.

Respectfully submitted,

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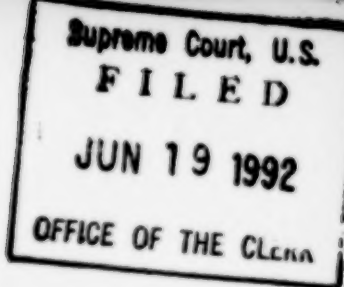
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(Footnote Continued)

116 L.Ed. 687, 705 (1992) drew attention to the fact that certain tribal members had acquired land in fee other than through an allotment act. Presumably some of that land has also passed to non-Indian ownership and would be subject to the controversy the State now places before this Court.

②
91-2031



NO. -
IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

STATE OF SOUTH DAKOTA IN ITS OWN
BEHALF, AND AS PARENS PATRIAE,

Petitioner,

v.

GREGG BOURLAND, PERSONALLY AND AS CHAIRMAN
OF THE CHEYENNE RIVER SIOUX TRIBE AND
WANITA MINOR, PERSONALLY AND AS DIRECTOR
OF CHEYENNE RIVER SIOUX TRIBE
GAME, FISH AND PARKS,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

APPENDIX TO PETITION
FOR WRIT OF CERTIORARI

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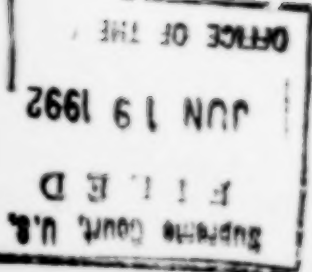


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A-1

STATE OF SOUTH DAKOTA in its
own behalf, and as parens
patriae, Appellee,

v.

Gregg BOURLAND, personally and as
Chairman of the Cheyenne River Sioux
Tribe and Dennis Rousseau, personally
and as Director of Cheyenne River
Sioux Tribe Game, Fish and Parks,
Appellants.

STATE OF SOUTH DAKOTA in its
own behalf, and as parens
patriae, Appellant,

v.

Gregg BOURLAND, personally and as
Chairman of the Cheyenne River Sioux Tribe
and Dennis Rousseau, personally
and as Director of Cheyenne River
Sioux Tribe Game, Fish and Parks,
Appellees.

Nos. 90-5486, 90-5515.

United States Court of Appeals,
Eighth Circuit.

Submitted May 15, 1991.

Decided Nov. 21, 1991.

Before BOWMAN, Circuit Judge, HEANEY and
BRIGHT, Senior Circuit Judges.
BOWMAN, Circuit Judge.

This is an appeal from the decision of the District Court permanently enjoining the tribal defendants from regulating the hunting and fishing activities of nonmembers of the Cheyenne River Sioux Tribe ("Tribe") on certain lands within the Cheyenne River Reservation. We affirm in part, reverse in part, and remand in part.¹

I.

The Great Sioux Reservation was established by the Treaty with the Sioux Indians, Apr. 29, 1868, 15 Stat. 635, 636 ("Fort Laramie Treaty"). It comprised virtually all of what is now South Dakota west of the Missouri River, as well as part

¹For purposes of this opinion, even though a cross-appeal was filed, the tribal defendants will be referred to, where appropriate, as "appellants" and the State as "appellee."

of what is now North Dakota. The Treaty explicitly recognized a number of tribal powers, including the exclusive right to use reservation lands. Id. at 636. In 1889, pursuant to the Act of March 2, 1889, ch. 405, 25 Stat. 888, the Great Sioux Reservation was divided into six separate reservations, one of which was the Cheyenne River Indian Reservation ("Reservation"). The Reservation lies in north-central South Dakota, with the Missouri River serving as its eastern border.

The Great Sioux Reservation was established at a time when the policy of the United States government was to enter into treaties with Indian tribes, establishing areas of sovereignty where tribes were allowed to govern themselves and to exercise control over "matters affecting tribal self-government." Felix S. Cohen, Handbook of Federal Indian Law 70 (Rennard Strickland,

et al., eds., Michie 1982) (1942) ("Handbook").² Land designated for the Reservation was held in trust by the United States for the benefit of the Tribe. In the late 1800s and early 1900s, however, the United States altered its policy regarding aboriginal tribes. The goal of the government became geared less towards self-sufficiency and self-rule for Indians; assimilation of Indians into the general population was the explicit goal. This was achieved by allowing non-Indians to acquire reservation land previously held in trust for Indians. "[A]n avowed purpose of the allotment policy was the ultimate destruction of tribal government." Montana v. United

²This policy, however, was not constant during the treaty-making period of the 1800s. See Felix S. Cohen, Handbook of Federal Indian Law 62-70 (Rennard Strickland, et al., eds., Michie 1982) (1942) ("Handbook").

States, 450 U.S. 544, 559 n. 9, 101 S.Ct. 1245, 1255 n.9, 67 L.Ed.2d 493 (1981). The policy was carried out by, inter alia, the General Allotment Act of 1887 ("Dawes Act"), 24 Stat. 388 and the Act of May 29, 1908, ch. 218, 35 Stat. 460, the latter of which allowed Reservation "surplus" lands to be sold to nonmembers.³ This policy of assimilation led to a vast reduction in the amount of reservation land held in trust by the United States for tribes or individual

³The Act of March 2, 1889, which created the Cheyenne River Indian Reservation and five other reservations from what had been the Great Sioux Reservation, also authorized presidentially-appointed agents to allot parcels of Reservation land to individual Indians, who in turn, after a period of years, were allowed to alienate freely their parcels of land to anyone, including nonmembers and non-Indians. Act of Mar. 2, 1889, ch. 405, §§ 10, 11, 25 Stat. 888, 891.

Indians.⁴ On the Cheyenne River Reservation, for example, land held in trust for Indians amounts to slightly less than half of the Reservation's total acreage.⁵

⁴The Acts of 1889 and 1908, while enabling non-Indians to acquire title of Reservation land, did not diminish the Reservation. See Solem v. Bartlett, 465 U.S. 463, 104 S.Ct. 1161, 1171, 79 L.Ed.2d 443 (1984).

⁵According to the District Court, trust land held for individual Indians or the Tribe amounts to 1,395,729 acres, or 49.8% of the Reservation's 2,806,914 total acres. South Dakota v. Ducheneaux, Civ. No. 88-3049, Mem. Op. at 7, 9 (D.S.D. August 21, 1990) ("August Memorandum Opinion"), reprinted in Appellant's Addendum at 7, 9. The District Court also found that "about 1,395,729 acres, or 46.5 percent" of the Reservation are held in fee simple by members and nonmembers. Id. at 9. The remaining 3.7% of the Reservation's acreage, the subject of this appeal, is the land taken by the United States for the Oahe Dam and Reservoir Project. Id. While the numbers cited by the court area not entirely free from minor error (46.5% of 2,806,914 is 1,305,215), this light discrepancy is not relevant to our decision.

Recognizing that the assimilation policy was not working as intended, the United States changed course in the 1930s to encourage tribal self-determination. In 1934 Congress passed the Indian Reorganization Act, codified as amended at 25 U.S.C. § 461 et. seq. (1988) ("IRA"), which allowed officially-recognized tribes to form their own constitutions and governments.⁶ Pursuant to the IRA, the Cheyenne River Sioux Tribe enacted a tribal constitution and passed by-laws regulating hunting and fishing on the Reservation. South Dakota v. Ducheneaux,

⁶The policy of encouraging Indian self-determination has been reaffirmed in the Indian Civil Rights Act of 1968, 25 U.S.C. § 1301 et seq. (1988), the Indian Financing Act of 1974, 25 U.S.C. § 1451 et seq. (1988), the Indian Self-Determination and Education Assistance Act, 25 U.S.C. §§ 450, 450a-450n, 458, 458a-458e (1988), and the Indian Child Welfare Act of 1978, 25 U.S.C. § 1901 et seq. (1988).

Civ. No. 88-3049, Mem.Op. at 9-10 (D.S.D. August 21, 1990) ("August Memorandum Opinion"), reprinted in Appellants' Addendum at 9-10. Congress later passed the Act of Aug. 15, 1953, Pub.L. No. 280, 67 Stat. 588 (codified in part at 18 U.S.C. § 1162 (1988) and 28 U.S.C. § 1360 (1988)) ("Public Law 280"), which was designed in part to transfer to certain state governments the power to regulate certain enumerated activities on Indian reservations. Included in Public Law 280 was a proviso recognizing that the law "shall [not] deprive any . . . Indian tribe . . . of any right . . . afforded under Federal treaty . . . with respect to hunting, trapping, or fishing or the control,

licensing or regulation thereof." 18 U.S.C. § 1162(b) (1988).⁷

In 1944, Congress passed the Flood Control Act, ch. 665, 58 Stat. 887 (1944) ("Flood Control Act"). This statute was enacted to allow the government to enter into negotiations with landowners along various stretches of the Missouri River to purchase tracts of riverfront land. The land was needed so that the Army Corps of Engineers could construct a series of dams along the River to prevent downstream flooding, to help with irrigation, and for other purposes.

⁷In the 1940s and 1950s, the federal government briefly turned to a "termination policy" in Indian affairs. Important to our case is that while this policy's effects were broad, it explicitly was applied to only a few tribes; moreover, the policy's goal was aimed more at terminating the federal government's role in Indian affairs than at terminating tribal sovereignty. See Handbook at 152-80.

Much of the land sought by the Corps was owned by or for Indians or Indian tribes. In 1950, Congress passed Pub.L. No. 870, 64 Stat. 1093 (1950) ("Public Law 870"), authorizing the Army and the Department of Interior to negotiate a contract with the Cheyenne River Tribe and the Standing Rock Sioux Tribe for land needed for the Oahe Dam and Reservoir. In the early 1950s, Congress authorized the purchase of land from six tribes in South Dakota pursuant to the Flood Control Act.⁸ By the Act of Sept. 3, 1954, Pub.L. No. 776, 68 Stat. 1191 ("Cheyenne River Act"), Congress appropriated \$10,644,014 for payment to the Tribe in exchange for rights to approximately 105,000

⁸For a discussion regarding one of these transactions, see Lower Brule Sioux Tribe v. South Dakota, 711 F.2d 809, 813-14 (8th Cir. 1983), cert. denied, 464 U.S. 1042, 104 S.Ct. 707, 79 L.Ed.2d 171 (1984).

acres⁹ of tribal and trust land abutting (and apparently partially underlying) the Missouri River.¹⁰ Included in this appropriation were monies for the loss of grazing revenue, loss of wildlife, and relocation costs. The Act, however, did not eliminate all tribal interests in the taken land. It explicitly noted that the Tribe and its members retained the right to hunt and fish on the land, and the right to lease the unflooded portion of

⁹It is unclear whether the 105,000 acres referred to as the taken land purchased pursuant to the Cheyenne River Act includes the approximately 18,000 acres of taken land that was previously held in fee by non-Indians. Appellee's Brief at 1. As mentioned in n.5, supra, minor discrepancies of this sort are not legally significant to our opinion in this case.

¹⁰This land so acquired by the United States, along with the non-Indian fee land acquired by the United States in conjunction with the Flood Control Act of 1944, ch. 665, 58 Stat. 887 ("Flood Control Act"), will be referred to as the "taken" land or area.

the taken land. It also granted to the Tribe leasing rights to the taken area that previously had been non-Indian fee land. Joint Appendix, vol. II at 433-39.

For a period of time, the Tribe and the State of South Dakota were able to negotiate successfully an agreement resolving the issue of regulatory authority over hunting and fishing activities on Reservation lands. In 1988, however, after negotiations for the upcoming deer hunting season broke off, the Tribe announced that it would not honor state permits issued to people wishing to hunt on the Reservation. The State filed suit, asking the District Court to enjoin the tribal defendants from regulating the hunting and fishing activities of non-Indians on non-Indian fee land and the taken land in the Reservation. The court determined that the Tribe possessed no regulatory authority over nonmembers hunting and fishing on nonmember

fee land and the taken areas, and permanently enjoined the defendants from attempting to exercise such authority.

On appeal, the tribal defendants raise four issues: 1) the District Court erred in not requiring the State to join the Tribe as an indispensable party; 2) the District Court erred in not requiring the State to join the United States as an indispensable party; 3) the District Court erred in ruling that the tribal defendants have no regulatory authority over nonmember Indians (as distinct from non-Indians) on the land in question because the issue was neither pled nor tried; and 4) the District Court erred in determining that the defendants possess no authority to regulate non-Indian hunting and

fishing on the taken area.¹¹ On cross-appeal, the State urges us either to declare as dicta language in the District Court opinion concerning the reach of the Lacey Act, codified in relevant part at 16 U.S.C. §§ 3371-78 (1988), and the federal trespass statute, 18 U.S.C. § 1165 (1988), or to reverse the District Court with respect to its interpretation of these statutes.

II

The tribal defendants claim that the District Court erred in proceeding with the case because the United States and the Tribe are indispensable parties, and that the case should not have proceeded in their absence. We review trial court determinations of

¹¹The tribal defendants do not appeal the portion of the District Court's opinion holding that they do not have the authority to regulate non-Indian hunting and fishing on non-Indian fee land.

indispensability under Fed.R.Civ.P. 19 for abuse of discretion. See Reserve Mining Co. v. Environmental Protection Agency, 514 F.2d 492, 534 (8th Cir. 1975), modified on other grounds, Reserve Mining Co. v. Lord, 529 F.2d 181 (8th Cir. 1976); accord Sindia Expedition v. Wrecked and Abandoned Vessel, 895 F.2d 116, 121 (3rd Cir. 1990); Travelers Indem. Co. v. Dingwell, 884 F.2d 629, 635 (1st Cir. 1989); McVay v. Western Plains Serv. Corp., 823 F.2d 1395, 1401 (10th Cir. 1987); Northern Alaska Env'tl. Ctr. v. Hodel, 803 F.2d 466, 468 (9th Cir. 1986); Pulitzer-Polster v. Pulitzer, 784 F.2d 1305, 1309 (5th Cir. 1986); but see Local 670 v. International Union, United Rubber, Cork, Linoleum and Plastic Workers, 822 F.2d 613, 619 (6th Cir. 1987), cert. denied, 484 U.S. 1019, 108 S.Ct. 731, 98 L.Ed.2d 679 (1988) (holding that determination of

indispensability is a legal conclusion subject to de novo review).

We hold that the District Court did not abuse its discretion in proceeding with the case without joining the United States as a party. The District Court issued its ruling on the assumption that the United States was an indispensable party pursuant to Rule 19(a) with respect to the taken area. It also assumed that the United States had not waived its sovereign immunity. The District Court, using the factors enumerated in Rule 19(b) and in Provident Tradesmens Bank & Trust Co. v. Patterson, 390 U.S. 102, 109-12, 88 S.Ct. 733, 737-39, 19 L.Ed.2d 936 (1968), to evaluate whether the action should proceed, decided in "equity and good conscience . . . that the present parties should be allowed to proceed with this case." South Dakota v. Ducheneaux, Civ. No., 88-3049, Mem. Op. at 8, (D.S.D. July 3, 1989) ("July Memorandum

Opinion"), reprinted in Appellants' Addendum at 58, 65. We cannot say that this finding was an abuse of discretion.¹²

With respect to the Tribe, the District Court found that the Tribe was not an indispensable party. This finding was not an abuse of discretion. Although the State attacks the validity of the Tribe's regulations, its claim is premised on the argument that "the conduct against which specific relief is sought is beyond the officer's powers and is, therefore, not the conduct of the sovereign [T]he power has been conferred in form but the grant is

¹²It is doubtful whether the United States is an indispensable party to this action, as it appears complete relief can be accorded the parties involved and apparently there is no substantial risk that any of the parties will be subjected to "inconsistent obligations." Fed.R.Civ.P. 19(a). But we need not and do not decide that question.

lacking in substance because of its . . . invalidity." Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682, 690, 69 S.Ct. 1457, 1462, 93 L.Ed. 1628 (1949). The State's suit seeking injunctive relief against the named tribal officials therefore is proper, id. at 689-90, 69 S.Ct. at 1461-62, and the Tribe is not an indispensable party.

III

The tribal defendants also claim that the District Court erred in determining that they have no jurisdiction over the hunting and fishing activities of nonmember Indians on nonmember fee lands or the taken area. We agree. The issue of tribal jurisdiction over nonmember Indians was neither pled or tried; the complaint was limited to the question of jurisdiction over non-Indians. See Second Amended Complaint, -reprinted in Joint Appendix, vol. I at 53. Issues not before

the trial court should not be addressed sua sponte. Contrary to the State's assertion, the Supreme Court's decision in Duro v. Reina, 495 U.S. 676, 110 S.Ct. 2053, 109 L.Ed.2d 693 (1990), does not resolve the issue of tribal civil jurisdiction over the hunting and fishing activity of nonmember Indians. Duro dealt only with tribal criminal jurisdiction over nonmember Indians. Id. 110 S.Ct. at 2056. Because tribal criminal jurisdiction and tribal civil jurisdiction have been treated differently by the courts, see Handbook at 245-46 (discussing cases), Duro cannot be said to have decided the issue of tribal civil jurisdiction. As this issue was not properly before the District Court, the portion of the District Court's opinion dealing with the defendants's (sic) regulatory authority over nonmember Indians is vacated.

IV.

In considering the State's claim that the tribal defendants have no authority to regulate non-Indian hunting and fishing on the taken land, we are required to pick up where we left off in Lower Brule Sioux Tribe v. South Dakota, 711 F.2d 809 (8th Cir. 1983), cert. denied, 464 U.S. 1042, 104 S.Ct. 707, 79 L.Ed.2d 171 (1984): we now must determine "whether the Tribe . . . has jurisdiction to regulate hunting and fishing by nonmembers of the Tribe within the . . . tak[en] areas." Id. at 825 n. 23.¹³ Although Lower Brule left this question open, it decided other issues important to our

¹³We are not asked to decide, and we do not address, the question of whether the State possesses regulatory authority in the taken area. The complaint filed by the State asked only for a determination of tribal authority within the taken area, not for a declaration of the State's authority.

inquiry. First, it seems clear from Lower Brule that the Cheyenne River Act did not disestablish the boundaries of the Reservation. Cf. id. at 821 (holding that two sister taking acts, with language similar to that used in the Cheyenne River Act, did not disestablish reservation boundaries). Lower Brule also held that the taking acts did not abrogate the hunting and fishing rights guaranteed to the Sioux tribes in the Fort Laramie Treaty. Id. at 826-27. Thus the Sioux retain their right to hunt and fish on their reservation free from state regulation. Id. at 827.

From that apparent simplicity, however, regulatory complexity lingers. On the one hand, the right of the Tribe to regulate non-Indian hunting and fishing on fee land acquired by non-Indians pursuant to the allotment policy has been abrogated by Congress. Montana, 450 U.S. at 559, 101

S.Ct. at 1255. On the other hand, the Tribe retains regulatory authority over non-Indian hunting and fishing on land held in trust for the Tribe by the United States. New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 330, 103 S.Ct. 2378, 2384 76 L.Ed.2d 611 (1983); Montana, 450 U.S. at 557, 101 S.Ct. at 1254. The taken area, however, is neither non-Indian-owned fee land nor trust land. In determining the scope of the Tribe's regulatory power over this land, we must use the approach followed by the Supreme Court and by our Court in Lower Brule: tribal rights are abrogated only if Congress "has clearly expressed its intent to do so," keeping in mind that "doubtful expressions of intent must be resolved in favor of the Indians." Lower Brule, 711 F.2d at 827; see also Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n., 443 U.S. 658, 690, 99 S.Ct. 3055, 3077, 61

L.Ed.2d 823 (1979) ("[a]bsent explicit statutory language, we have been extremely reluctant to find congressional abrogation of treaty rights"), modified on other grounds sub nom., Washington v. United States, 444 U.S. 816, 100 S.Ct. 34, 62 L.Ed.2d 24 (1979); Menominee Tribe of Indians v. United States, 391 U.S. 404, 413, 88 S.Ct. 1705, 1711, 20 L.Ed.2d 697 (1968) ("'[T]he intention to abrogate or modify a treaty is not to be lightly imputed to the Congress'") (quoting Pigeon River Improvement, Slide & Boom Co. v. Charles W. Cox Co., 291 U.S. 138, 160, 54 S.Ct. 361, 367, 78 L.Ed. 695 (1934)); Iowa Mut. Ins. co. v. LaPlante, 480 U.S. 9, 18, 107 S.Ct. 971, 978, 94 L.Ed.2d 10 (1987) ("'[A] proper respect both for tribal sovereignty itself and for the plenary authority of Congress in this area cautions that we tread lightly in the absence of clear indications of legislative intent'") (quoting

Santa Clara Pueblo v. Martinez, 436 U.S. 49, 60, 98 S.Ct. 1670, 1678, 56 L.Ed.2d 106 (1978)); County of Oneida v. Oneida Indian Nation, 470 U.S. 226, 247, 105 S.Ct. 1245, 1258, 84 L.Ed.2d 169 (1985) ("[I]t is well established that treaties should be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." (citations omitted)).

Using this approach, we must identify the rights originally granted to the Tribe and track subsequent alterations to, and limitations of, those rights. The Fort Laramie Treaty granted the Tribe an exclusive right to control hunting and fishing on the Reservation. Fort Laramie Treaty, 15 Stat. 636; Lower Brule, 711 F.2d at 815; see also United States v. Dion, 476 U.S. 734, 738, 106 S.Ct. 2216, 2219, 90 L.Ed.2d 767 (1986) ("As a general rule, Indians enjoy exclusive treaty rights to hunt and fish on lands

reserved to them, unless such rights were clearly relinquished by treaty or have been modified by Congress. . . . These rights need not be expressly mentioned in the treat.") (citation omitted) (unanimous opinion). Cf. Montana, 450 U.S. at 558-59, 101 S.Ct. at 1254-55 (Fort Laramie Treaty conferred the authority to regulate hunting and fishing on the reservation). Complete jurisdiction over hunting and fishing on the Reservation was not to last, however, as land on the Reservation fell into the hands of non-Indians pursuant to the allotment policy. As noted in Montana and Brendale v. Confederated Tribes & Bands of Yakima Indian Nation, 492 U.S. 408, 109 S.Ct. 2994, 106 L.Ed.2d 343 (1989), non-Indian hunting and fishing on non-Indian reservation fee land is not necessarily subject to tribal regulation: "[A]ny regulatory power the Tribe might have under the treaty 'cannot apply to lands held

in fee by non-Indians.'" Brendale, 492 U.S. at 425, 109 S.Ct. at 3005 (quoting Montana, 450 U.S. at 559, 101 S.Ct. at 1255) (White, J., plurality opinion).¹⁴

The Montana and Brendale decisions are based on an analysis that found an unmistakable Congressional intent to abrogate tribal regulatory authority over non-Indian hunting and fishing on non-Indian fee land:

We analyzed the effect of the Allotment Act on an Indian tribe's treaty rights to regulate activities of nonmembers on fee land in Montana . . . [W]e concluded that "treaty rights with respect to reservation lands must be read in light of the subsequent alienation of those lands." [Montana, 450 U.S. at 561, 101 S.Ct. at 1256]. In Montana, as in the present cases, the lands at issue had been alienated under the Allotment Act, and the Court concluded that "[i]t defies common sense to suppose that Congress would intend that non-Indians purchasing allotted lands would become subject to tribal jurisdiction when an avowed purpose of the allotment policy

¹⁴ Montana noted two exceptions to this rule. See n. 20, *infra*.

was the ultimate destruction of tribal government." 450 U.S. at 560, n.9, 101 S.Ct. at 1256, n.9.

Brendale, 492 U.S. at 422-23, 109 S.Ct. at 3004 (citations omitted) (White, J., plurality opinion). It is because of the intent to destroy tribal government underlying the Allotment Acts that the Montana and Brendale Courts found that tribal regulatory authority over non-Indian hunting and fishing on non-Indian fee land had been abrogated. Accordingly, in order for us to determine the Tribe's jurisdiction over the taken land, we must examine the policy behind the Cheyenne River Act to see if Congress clearly expressed an intent to divest the Tribe of regulatory authority over non-Indian hunting and fishing activity on the taken area. See Dion, 476 U.S. at 738-39, 106 S.Ct. at 2219-20.

The State contends that Section Four of the Flood Control Act, codified at 16 U.S.C.

§ 460d (1988) contains language that evinces a clear intent to abrogate the Tribe's regulatory rights with respect to hunting and fishing on the taken land. Section Four reads in relevant part: "No use of [the reservoirs created pursuant to the Act] shall be permitted which is inconsistent with the laws for the protection of fish and game of the State in which such area is situated." Id. This language is not a sufficiently clear expression of an intention to divest tribal regulatory authority on the taken area. Lower Brule, 711 F.2d at 826-27.

In Lower Brule, we noted that this language in Section Four "cannot be viewed in isolation. . . . The 1944 act envisions a scheme of federal--not state--regulation over flood control projects." Id. at 825 n.23. Section Four merely insures that state fish and game authority, where already in effect, would not be preempted by the federal

government. It means "only that the Secretary of the Army cannot promulgate regulations regarding recreational activities by the 'general public' within 'public park and recreation facilities' which contravene state conservation laws." Id. It cannot be read to evince a "transfer" of authority from the Tribe to the State, especially in light of the fact that tribal rights are never mentioned in Section Four.¹⁵ If we were to read Section Four as the State urges, the State, and not the Tribe, would have

¹⁵Indeed, the only mention of Indians in the Flood Control Act occurs in Section 9(c), which states that "irrigation of Indian trust and tribal lands, and repayment therefor, shall be in accordance with the laws relating to Indian lands." Flood Control Act, 58 Stat. 891. This reference in no way implicates tribal regulatory authority; at most, it can be viewed as support for the notion that the Flood Control Act meant to retain the status quo with respect to Indian rights.

regulatory authority over Indians hunting and fishing on the taken area. This result, of course, expressly was rejected in Lower Brule. As we recognized, "there is simply no indication in the legislative history that Congress even considered Indian rights when it adopted section 4." Lower Brule, 711 F.2d at 825 n.23. Thus, Section Four falls well short of the required "clear[] express[ion] [of Congressional] intent." Id. at 827.¹⁶

¹⁶It bears repeating that the Flood Control Act was passed during a period when the federal government's "Indian policy" was to promote tribal autonomy and self-government, see supra at 987-988. This is in distinct contrast to the explicit policy in place during the time the Allotment Acts were enacted; namely, a policy of "destruction of tribal government." Montana v. United States, 450 U.S. 544, 560 n.9, 101 S.Ct. 1245, 1256 n.9, 67 L.Ed.2d 493 (1981). Considered in this context, the bid to view Section Four of the Flood Control Act as a clear expression of an intent to abrogate Tribal rights loses even more stature.

The State also points to Public Law 870, which authorized the Corps of Engineers and the Interior Department to negotiate a contract with the Tribe for the land needed to construct the Oahe Dam and Reservoir. The bill introduced in the Senate leading up to the passage of Public Law 870 contained a section stating that the contract shall "provide for the preservation of treaty rights of the tribe. . . in regard to fishing, hunting, and trapping insofar as is practicable under the physical conditions existing when the Oahe project is completed."

S. 1488, 81st Cong., 1st Sess., § 2(e) (1949), reprinted in Joint Appendix, vol. III at 561.

The House version of the bill contained virtually identical language. H.R. 5372, 81st Cong., 1st Sess. § 2(d) (1949), reprinted in Joint Appendix, vol. III at 552.

In its final version, however, Public Law 870 contained no such express language.

Instead, it simply provided for "just compensation for lands and improvements and interests therein." 64 Stat. 1094. The State contends that this history "show[s] that the Congress considered and rejected the possibility of retaining in the Tribe its hunting and fishing treaty rights." Appellee's Brief at 21. We disagree, as such analysis turns Washington and Menominee on their heads. Proper analysis of Indian legislation finds the elimination of treaty rights only when such action is clearly expressed; statutes are not examined for an affirmative reaffirmation of previously-granted treaty rights. We find no clear expression in Public Law 870 of an intent to abrogate the Tribe's regulatory jurisdiction over non-Indians hunting and fishing in the taken area.

The State next turns to the Cheyenne River Act for evidence of an intent to

abrogate the Tribe's regulatory powers on the taken land. The purpose of the Cheyenne River Act, as stated in its preamble, was to "provide for the acquisition of lands by the United States required for the reservoir created by the construction of the Oahe Dam. . . and for rehabilitation of the Indians of the Cheyenne River Sioux Reservation, South Dakota, and for other purposes." 68 Stat. 1191. The dam was built for irrigation and flood control purposes, not for purposes of settling non-Indians on the taken lands. Lower Brule, 711 F.2d at 820; see also ETSI Pipeline Project v. Missouri, 484 U.S. 495, 502, 108 S.Ct. 805, 810, 98 L.Ed.2d 898 (1988) (stating that the purpose of the Flood Control Act was to erect the Oahe Dam).

The Cheyenne River Act "convey[ed] to the United States all tribal, allotted, assigned, and inherited lands or interests

within said Cheyenne River Reservation belonging to the Indians of said reservation [needed for the Oahe Dam and Reservoir], . . . subject, however, to the conditions of this agreement hereinafter set forth. . . ."

68 Stat. 1191. Among the conditions placed on the conveyance were that "all mineral rights . . . within the taken area" would be reserved to the Tribe or its members, 68 Stat. 1192; that "[t]he members of the said Indian Tribe shall have the right without charge to cut and remove all timber and salvage any portion" of the improvements on the taken area, *id.*; that the members of the Tribe residing within the taken area "shall have the right without charge to remain on and use the lands" until the gates of the Dam were closed, *id.*; that the Tribe and its members "shall have the right to graze stock" on the unflooded portion of the taken area, including land previously held in fee by

non-Indians, 68 Stat. 1193; and that the "Tribal Council and the members of the said Indian tribe shall have, without cost, the right of free access to the shoreline of the reservoir including the right to hunt and fish" in the taken area, including the reservoir, "subject, however, to regulations governing the corresponding use by other citizens of the United States." *Id.*

The conveyance of tribal land to the United States also was conditioned upon the payment for costs of relocating "Indian cemeteries, tribal monuments and shrines within the taken area," *id.* at 1191, and for the costs of relocating schools, hospitals, and other facilities, *id.* at 1192; and upon payment for

the purpose of complete rehabilitation for all members of said Tribe who are residents of the [Reservation], whether or not residing within the taking area of the Oahe Project, and for relocating and reestablishing

members of said Tribe who reside [in the taken area] to the extent that the economic, social, religious, and community life of all said Indians shall be restored to a condition not less advantageous to said Indians than the condition that the said Indians now are in.

68 Stat. 1192.

It is obvious, then, that the Cheyenne River Act was not a simple conveyance of land and all attendant interests in the land. Significant portions of the "bundle of property rights" explicitly were reserved to the Tribe. The purpose of the Act, unlike that of the Allotment Act at issue in Montana, was not the destruction of tribal self-government, but was only to acquire the property rights necessary to construct and operate the Oahe Dam and Reservoir.¹⁷ The

¹⁷The Corps of Engineers was authorized to negotiate a contract to "provide for
(Footnote Continued)

tribe retained significant rights in the taken land, including the leasing rights to grazing land previously held in fee by non-Indians. Joint Appendix, vol. II at 433-39. We recognized in Lower Brule that "[c]ontinued Indian control of [the taken area] is not inconsistent with the federal government's purpose in acquiring the property, as might be the case if, for example, the reservation was acquired to permit settlement by non-Indians." Lower Brule, 711 F.2d at 818 n.10.

Examination of the legislative history of the Act reveals no clear intent to eliminate tribal regulatory rights. In a

(Footnote Continued)
conveyance to the United States of the title to all tribal, allotted, and inherited lands or interests therein belonging to the Indians of the tribe which are required by the United States for the Oahe Dam and Reservoir." H.R. Rep. No. 2484, 83rd Cong., 2d Sess., at 3 (1954) (emphasis added).

letter appended to the House Report on the Act, the Department of the Army reported that the Corps of Engineer opposed the section of the Act recognizing that the Tribe retained its hunting and fishing rights on the taken area, H.R.Rep. No.2484, 83rd Cong., 2d Sess. at 11 (1954), but Congress declined to remove the language. Neither the House Committee Report, H.R.Rep. 2484 at 1, nor the Senate Committee Report, S.Rep. No. 2489, 83rd Cong., 2d Sess. 1 (1954), both of which accompanied the Act, make any mention of the jurisdictional issue concerning regulatory authority over hunting and fishing on the taken lands. Nor does the letter from the Assistant Secretary of the Interior Department, attached to both Committee Reports, discuss the issue. As the District Court noted in its opinion, "[c]ircumstances surrounding the Cheyenne River Act indicate that the jurisdiction issue simply was not

considered." August Memorandum Opinion at 45, reprinted in Appellant's Addendum at 45.

We agree with the District Court's conclusion that Congress did not consider the issue of jurisdiction to regulate hunting and fishing when enacting the Cheyenne River Act. The significance we attach to this lack of consideration, however, is markedly different from the significance the District Court attached to it. The District Court assumed that the taken land could not be distinguished from fee land alienated pursuant to the Allotment Acts as described in Montana. It then used the absence of an intent to deal with the jurisdictional issue as a basis for concluding that Congress abrogated tribal regulatory rights via the Act and declined affirmatively to grant such rights back to the Tribe. In so proceeding, the District Court erred. The correct analysis, the one counselled by the Supreme

Court, is to look to the purpose of the Act and to decline a jurisdictional issue left unresolved by the language of the Act in light of that purpose. As the purpose of the Act was simply to enable the United States to acquire the land needed for the construction of the Oahe Dam and Reservoir, and to do so with as little disruption as possible to the life of the Tribe, the Tribe must be given the benefit of the doubt. We do not have here the essential "clear evidence that Congress actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other, and chose to resolve that conflict by abrogating the treat." Dion, 476 U.S. at 740 106 S.Ct. at 2220. Thus, applying Dion, 476 U.S. at 738-40, 106 S.Ct. at 2219-21, Washington, 443 U.S. at 690, 99 S.Ct. at 3076, and Menominee, 391 U.S. at 413, 88 S.Ct. at 1711, we conclude that the Tribe's treaty based right

to regulate non-Indian hunting and fishing activities on the portion of the taken area conveyed pursuant to the Cheyenne River Act has not been abrogated.¹⁸ Cf. Iowa Mut. Ins., 480 U.S. at 18, 107 S.Ct. at 977-78 ("Because the Tribe retains all inherent attributes of sovereignty that have not been

¹⁸Our holding, recognizing tribal regulatory authority over non-Indians on land not held by or for Indians without first conducting a Montana analysis, is not unique. In New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 330, 103 S. Ct. 2378, 2384, 76 L.Ed.2d 611 (1983), a unanimous Supreme Court noted that New Mexico had conceded that the Tribe may regulate non-member hunting and fishing on the reservation. No mention was made, however, of a possible conflict with the Court's Montana decision concerning the land on the reservation not owned by or for Indians. Although such land was only a small part of the reservation (193.85 acres out of a total of 460,000 acres), Mescalero, 462 U.S. at 326, 103 S.Ct. at 2382, it is instructive that there was no dispute or discussion concerning jurisdiction over this land. In fact, the Court declined to allow the State even concurrent jurisdiction over this land. Id. at 344, 103 S.Ct. at 2392.

divested by the Federal Government, the proper inference from silence . . . is that the sovereign power . . . remains intact.'") (quoting Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 148 n. 14, 102 S.Ct. 894, 907 n. 14, 71 L.Ed.2d 21 (1982)). The order of the District Court permanently enjoining the defendants from enforcing tribal hunting and fishing regulations on such land therefore is reversed.

This is not to say, however, that the Tribe is free entirely to exclude non-Indians from hunting and fishing on the portion of the taken land over which it has control. The Tribe's "right to hunt and fish in and on the [Oahe Dam] shoreline and reservoir [is] subject, however, to regulations governing the corresponding use by other citizens of the United States." Cheyenne River Act, 68 Stat. 119. Further, Section Four of the Flood Control Act requires that the "water

areas of all such projects shall be open to public use generally." 16 U.S.C. § 460d. It appears, then, that the Tribe may not enact a flat ban on non-Indian hunting or fishing on the portion of the taken are subject to tribal jurisdiction, nor may it impose unreasonably discriminatory limits on such activities. The scope of the Tribe's regulations are not presently at issue, however, and so we decline to address this question further.

With respect to the portion of the taken area that is comprised of land other than that conveyed to the United States pursuant to the Cheyenne River Act, we remand the case to the District Court. According to the State, the taken area includes approximately 18,000 acres of land which previously had been held by non-Indians. Appellee's Brief at 1. This land cannot be grouped with the taken land previously held by or for Indians.

As we have noted, neither the Flood Control Act, Public Law 870, nor the Cheyenne River Act addresses the issue of tribal jurisdiction within the taken area. With respect to the 18,000 acres of taken land previously held in fee by non-Indians, this cuts against the Tribe. Congress has not affirmatively granted to the Tribe regulatory authority over such land. Since Montana held that tribes have been divested of their regulatory authority over non-Indians hunting and fishing on land held in fee by non-Indians pursuant to an allotment act, the lack of a grant of such power requires us to conclude that the Tribe does not possess such authority, unless one of the Montana

exceptions is met.¹⁹ Montana, 450 U.S. at 559, 565-66, 101 S.Ct. at 1255, 1258.

The District Court found that the taken area has not a "pristine," or closed, area, as that term is used in Justice Stevens' plurality opinion in Brendale, 492 U.S. at 439, 445, 109 S.Ct. at 3012, 3015. August Memorandum Opinion at 17, reprinted in Appellants' Addendum at 17. Because the 18,000 acres within the taken area are in an "open" area, the analysis used by Justice White in his plurality opinion in Brendale should be applied to this acreage. According to Justice White's opinion, the 18,000 acres should be analyzed under the Montana

¹⁹Our order is based, of course, on the assumption that these 18,000 acres previously had been held in fee by non-Indians pursuant to an allotment act. If this is not the case, then the analysis of the jurisdictional issue concerning this land may be different.

standard. Brendale, 492 U.S. at 421-33, 109 S.Ct. at 3003-09. The District Court performed such an analysis of the taken area in whole, and found that neither of the exceptions to the general rule laid out in Montana applied. However, in light of our holding that the tribal defendants possess regulatory authority over the rest of the taken area, it would be appropriate for the District Court to again undertake a Montana analysis, limiting its inquiry to the 18,000 acres in question.²⁰

²⁰The exceptions noted in Montana that would allow tribes to exercise regulatory authority over non-Indian activity on land held in fee by non-Indians are: 1) the "activities of nonmembers who enter consensual relationships with the tribe or its members," Montana, 450 U.S. at 565, 101 S.Ct. at 1258; and 2) the "conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the

(Footnote Continued)

We recognize that the jurisdictional map resulting from our opinion may be a confusing "checkerboard," with neighboring tracts of land subject to different regulations.²¹ In fact, however, a "checkerboard" pattern of jurisdiction already exists on the Reservation, as non-Indians hunting on non-Indian fee land are subject to a different regulatory scheme from the one they are subject to when they hunt on (possibly neighboring) tribal land. The Supreme Court in Montana and Brendale authorized such

(Footnote Continued)
health or welfare of the tribe." Id. at 566, 101 S.Ct. at 1258. It is conceivable that the District Court may find that non-Indian hunting and fishing on the 18,000 acres within the taken land meets one of these exceptions, in light of our decision that the Tribe retains regulatory authority over the remainder of the taken land.

²¹The potential for jurisdictional confusion is heightened with respect to the submerged portion of the taken area.

"checkerboard" jurisdiction by mandating that neighboring tracts of land be subject to different regulatory authorities on the basis of the type of ownership, or the nature, of the land. This mandated "checkerboarding" has been in effect now for at least eleven years; if it is a problem that needs fixing, the remedy lies with Congress, not the courts.²²

This "checkerboarding" jurisdictional problem does give us, however, a reason to take the time to urge upon the parties the benefit of a negotiated settlement. As long as the issue of tribal jurisdiction is

²²The problem, if there is one, is not the direct result of the Montana opinion. "Checkerboard" jurisdiction is the result of frequent changes of course by the federal government in its policies concerning the Indians and their land. Over the years, these policy changes have brought about contradictory and confusing results.

avoided by Congress, jurisdictional problems like those encountered in this case are sure to continue to be presented;²³ litigated results are likely to leave all parties less than satisfied. In this case, each party could benefit from a negotiated settlement of the jurisdictional issue. As was noted at oral argument, this case "cries out" for a settlement. We are hopeful some reasonable accommodation satisfactory to both parties can be reached.

V

On cross-appeal, the State takes issue with language in the District Court opinion concerning both the Lacey Act, 16 U.S.C. §§ 3371-78, and the federal trespass statute, 18 U.S.C. § 1165. As the District Court itself noted, "[t]he scope of the federal

²³See, i.e., n. 13. supra.

government's prosecutorial powers under the Lacey Act is unrelated to the question whether the Tribe can exclude non-members from the taken area or fee lands." August Memorandum Opinion at 51, reprinted in Appellants' Addendum at 51 (emphasis in original). The court's discussion concerning the scope of the Lacey Act therefore is dicta. With respect to the discussion in the District Court's opinion concerning the federal trespass statute, the District Court again made passing reference to a source of federal, not tribal jurisdiction. August Memorandum Opinion at 46, reprinted in Appellant's Addendum at 46. Such language also is dicta.

VI

To sum up, we affirm the District Court's decision not to join either the Tribe of the United States as an indispensable party. We vacate the order of the District

Court to the extent that it deals with tribal regulatory authority over nonmember Indians. We reverse the order of the District Court permanently enjoining the tribal defendants from enforcing tribal hunting and fishing regulations on the portion of the taken land conveyed pursuant to the Cheyenne River Act. Finally, with respect to the portion of the taken area comprising land other than that conveyed to the United States pursuant to the Cheyenne River Act, we remand the case to the District Court for proceedings consistent with this opinion.

FILED MAY 6, 1992

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

 No. 90-5486

State of South Dakota *
 in its own behalf, *
 and as parens *
 patriae, *

Appellee, *

v. *

Gregg Bourland, *
 personally and as *
 Chairman of the *
 Cheyenne River Sioux *
 Tribe and Dennis *
 Rousseau, personally *
 and as Director of *
 Cheyenne River Sioux *
 Tribe Game, Fish and *
 Parks, *

Appellants. *

 No. 90-5515

Appeal from the
 * United States District
 * Court for the District
 * of South Dakota.

State of South Dakota *
 in its own behalf, *
 and as parens *
 patriae, *

Appellant, *

v. *

Gregg Bourland, *
 personally and as *
 Chairman of the *
 Cheyenne River Sioux *
 Tribe and Dennis *
 Rousseau, personally *
 and as Director of *
 Cheyenne River Sioux *
 Tribe Game, Fish *
 and Parks, *

Appellees. *

Appeal from the
 * United States District
 * Court for the District
 * of South Dakota.

 JUDGMENT

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in this case is affirmed in

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part, reversed in part and remanded to the district court for proceedings consistent with the opinion of this Court.

November 21, 1991

A true copy.

ATTEST: Michael E. Gans
CLERK, U.S. COURT OF APPEALS, EIGHTH
CIRCUIT

A-55

United States Court of Appeals,
FOR THE EIGHTH CIRCUIT

No. 90-5486/5515SDP

State of South	*	
Dakota,	*	
	*	
Appellant,	*	
	*	ORDER DENYING
v.	*	PETITION FOR
	*	REHEARING AND
Gregg Bourland,	*	SUGGESTION FOR
	*	REHEARING EN BANC
Appellee.	*	

The suggestion for rehearing en banc is denied. The petition for rehearing is also denied.

March 23, 1992

Order Entered at the Direction of the Court:

Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit

A-56

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
CENTRAL DIVISION

DONALD J. PORTER
CHIEF JUDGE
413 U.S. COURTHOUSE
PIERRE, SOUTH DAKOTA 57501

August 21, 1990

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A-57

RE: CIVIL NO. 88-3049
STATE OF SOUTH DAKOTA, Plaintiff,
vs.
WAYNE DUCHENEAUX, personally and as
Chairman of the Cheyenne River Sioux
Tribe, and LENITA MINER, personally and
as Director of Cheyenne River Sioux
Tribe Game, Fish and Parks, Defendants.

Dear Counsel:

MEMORANDUM OPINION

This action for declaratory and
injunctive relief was brought by the State of
South Dakota against tribal defendants Wayne
Ducheneaux, chairman of the Cheyenne River
Sioux Tribal Council, and Lenita Miner,
director of the Cheyenne River Sioux Tribe
Game, Fish and Parks. The controversy
involves the extent of tribal hunting and
fishing jurisdiction over nonmembers²⁴ on

²⁴Following the United States Supreme
Court's recent opinion in Duro v. Reina,
--- U.S. ---, 110 S. Ct. 2053, 109 L. Ed. 2d
693 (1990), a decision on the limits of
tribal civil jurisdiction over non-Indians on
(Footnote Continued)

lands within the exterior boundaries of the

(Footnote Continued)

certain reservation lands should also decide the limits of tribal civil jurisdiction over nonmember Indians on those same lands. Justice Kennedy, writing for the majority, aptly summed up the Court's holding:

The question we must answer is whether the sovereignty retained by the tribes in their dependent status within our scheme of government includes the power of criminal jurisdiction over nonmembers.

We think the rationale of our decisions in Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 98 S. Ct. 1011, 55 L.Ed. 2d 209 (1978)] and [(United States v. Wheeler, [435 U.S. 313, 98 S. Ct. 1079, 55 L.Ed.2d 303 (1978)] as well as subsequent cases, compels the conclusion that Indian tribes lack jurisdiction over persons who are not tribe members.

Duro, 110 S. Ct. at 2059.

Even though the state's complaint seeks a determination of tribal jurisdiction over "non-Indians" without reference to nonmember Indians, Duro effectively eliminates any distinction. Accordingly, throughout this

(Footnote Continued)

Cheyenne River Reservation no longer owned by the Cheyenne River Sioux Tribe (Tribe) or any of its members. These lands either are (1) held in fee by nonmembers or (2) were taken by the United States to construct the Oahe dam and reservoir. As this case concerns tribal rights and powers granted by various treaties and federal statutes, the Court has jurisdiction in this case pursuant to 28 U.S.C. §§ 1331.

After the State and the tribal defendants were unable to reach an agreement for the 1988 deer season for Dewey and Ziebach counties, South Dakota on its own

(Footnote Continued)

opinion the Court refers to both nonmember Indians and non-Indians as "nonmembers." See Lower Brule Sioux Tribe v. South Dakota, 540 F. Supp. 276, 288 n.14 (D.S.D. 1982), rev'd on other grounds, 711 F.2d 809 (8th Cir. 1983).

behalf and on behalf of its citizens parens patriae sought the following relief:

WHEREFORE, the State of South Dakota respectfully requests this Court as follows:

A. To assume immediate jurisdiction over this matter.

B. Issue a declaratory judgment determining:

(1) Defendants have no jurisdiction to arrest and try non-Indians within the boundaries of the Cheyenne River Sioux Tribe [sic] for any offense; and

(2) Defendants have no jurisdiction to exclude non-Indians from hunting on fee lands or public lands and waters within or purportedly within the Cheyenne River Sioux Reservation, including land and water areas taken by the United States for the building of the Oahe Reservoir.

(3) In the alternative to paragraphs (1) and (2) above, that the reservation has been diminished by the federal acts taking lands and overlying waters for the reservoir and, if found to be necessary, by the tribal members' consent to the federal actions.

* * *

Plaintiff's Second Amended Complaint, p. 9
(February 6, 1989).

South Dakota contends that Congress intended to disestablish the reservation boundaries when the subject lands were taken out of trust status and conveyed either to nonmembers or the United States. In the alternative, the State argues that treaty rights conferring regulatory authority upon the Tribe over hunting and fishing by nonmembers have been abrogated and that inherent Indian sovereignty does not necessitate tribal civil jurisdiction over this matter. Finally, the State interprets the tribal defendants' admonition as threatening impermissible criminal prosecution if sportsmen fail to comply with tribal licensing regulations. Thus, even if the Tribe has jurisdiction over nonmembers, the State argues that the defendants would exercise tribal jurisdiction in a manner proscribed by law.

The tribal defendants point to past cases which have held that no disestablishment of the reservation boundaries occurred. In addition, they argue that those acts of Congress which allowed the transfer of tribally-owned lands to nonmembers or the federal government reserved tribal jurisdiction over all persons hunting and fishing on those lands. The defendants also assert that, because tribal civil jurisdiction derives from rights and powers inherent in the Tribe as a sovereign government, they have the authority to enforce tribal licensing regulations against nonmembers because the Tribe has always retained power over all hunting and fishing within the reservation. Finally, the tribal defendants deny that they would impose criminal sanctions against nonmember violators as the Cheyenne River Sioux Tribal

Court has held that it may impose only civil sanctions against nonmembers.

Having considered carefully the contentions of all involved, the Court finds that, while the lands removed from trust status did not disestablish the reservation boundaries, the Tribe nonetheless has no civil jurisdiction over the hunting and fishing activities of nonmembers on those lands. The tribal defendants, therefore, are permanently enjoined from area or fee lands and from imposing tribal game licensing regulations upon them.

BACKGROUND

I

The Cheyenne River Reservation lies wholly within Dewey and Ziebach counties in north-central South Dakota, bordered on the east by the Missouri River. Early in the fall of 1988, representatives of the South Dakota Department of Game, Fish and Parks

submitted a proposed agreement for the 1988 Dewey-Ziebach deer hunting season to the Tribe. The State later submitted a second proposed agreement after negotiations with the Tribe. During these negotiations, tribal representatives expressed concern that the proposal did not adequately protect the grazing permit rights of tribal members on a strip of land adjacent to the Missouri River called the "taken area." The Tribe sought to include a provision requiring that any nonmember wishing to hunt on the taken area must first secure tribal permission. The State refused to grant this concession.

The State filed its complaint after tribal representatives issued this announcement to the local media:

DUE TO THE STATE OF SOUTH DAKOTA'S INTRANSIGENCE, ALL HUNTERS MUST NOW HOLD A CHEYENNE RIVER SIOUX TRIBAL HUNTING LICENSE TO HUNT ON ANY AND ALL LANDS WITHIN THE EXTERIOR BOUNDARIES OF THE RESERVATION. THE STATE LICENSES WILL NO LONGER BE

HONORED AND VIOLATORS ARE SUBJECT TO PROSECUTION IN TRIBAL COURT.

The tribal defendants initially sought to dismiss the complaint. The Court, by order and accompanying memorandum opinion filed July 3, 1989, denied the motion. Although the parties addressed the issue whether the sanctions threatened by the tribal defendants against nonmember violators were criminal in nature, the Court focused on whether the United States and the Tribe itself were indispensable parties who could not be sued under the doctrine of sovereign immunity. Guided by Fed.R.Civ.P. 19, this Court concluded that, notwithstanding that sovereign immunity prohibited maintaining the action against either the United States or the Tribe itself, the United States and the Tribe were not indispensable parties to the

lawsuit.²⁵ The Court adheres to its earlier ruling.

II

The treaty of April 29, 1868, 15 Stat. 635 (1868) (hereafter 1868 Fort Laramie Treaty) established the boundaries of the Great Sioux Nation. Out of this vast territory, Congress later set aside for the Tribe what is now the Cheyenne River Reservation. Act of March 2, 1889, 25 Stat. 889 (1889) (hereafter Act of 1889).

²⁵This Court noted (1) that the interests of the United States would not be impaired and that equity and good conscience warranted continued litigation; and (2) that the complaint targeted conduct of the tribal defendants as outside the scope of their authority. Dismissal for failure to join the Tribe was improper because the question whether the tribal defendants were acting beyond their authority was the precise question to be addressed at the trial on the permanent injunction motion.

Not all the land within the reservation is owned by the Tribe, its members or held in trust by the United States on their behalf.²⁶ This relinquishment of title resulted from various federal programs which either encouraged nonmember settlement or furthered national public projects. Today, the reservation consists of approximately 2,806,914 acres of which slightly less than half are held in trust for the Tribe. About 1,411,000 acres of non-trust land passed out of trust status as a result of acts of Congress.

The Act of 1889 allotted to individual Indians parcels of land with title in the

²⁶Trust lands are lands allotted to individual Indians and held by the United States in trust for them, see Burke Act of 1906, 34 Stat. 132 (codified at 25 U.S.C. § 349), or held by the United States for the benefit of the Tribe itself.

United States in trust for the allottee for twenty-five years. Following the issuance of fee patents by the Secretary of the Interior of Indian allottees, many of these allotted lands were acquired by nonmembers of the Tribe through sale or inheritance. A large amount of unallotted land considered by Congress to be surplus land was later taken out of trust status as a result of the Act of May 29, 1908, 35 Stat. 460 (1908) (hereafter Act of 1908). This Act allowed nonmembers to homestead the property and claim fee title to lands lying within the reservation boundaries. The Acts of 1889 and 1908 took approximately 1,307,000 acres of reservation land out of trust status.

Congress also acquired certain trust lands for flood control on the Missouri River. The Oahe reservoir was built pursuant to the Flood Control Act of 1944, 58 Stat. 886 (hereafter Flood Control Act). The

United States Supreme Court traced the history of the Flood Control Act in ETSI Pipeline Project v. Missouri, 484 U.S. 495, 108 S. Ct. 805, 98 L.Ed.2d 898 (1988), and noted that it was conceived to remedy two distinct water problems on the Missouri River Basin watershed. South Dakota, like other states in the upper Basin region, experienced difficulties in developing Missouri River water for agricultural and industrial purposes, while states in the lower Basin region experienced seasonal skirmishes with flood control and navigation. Id. at 499.

The Flood Control Act was a compromise between proponents of two comprehensive plans for the project -- the Pick Plan and the Sloan Plan. Among other things, the compromise plan provided for six main-stem reservoirs on the Missouri River. The largest of these, the Oahe Dam and Reservoir Project, would enable "the irrigation of

750,000 acres of land in the James River Basin as well as . . . provide useful storage for flood control, navigation, the development of Hydroelectric power, and other purposes.'" Id. at 502 (citing S. Doc. No. 247, 78th Cong., 2d Sess., 3 (1944)). Building the Oahe dam and reservoir required the Cheyenne River Tribe to relinquish 104,420 acres of valuable bottomland--"the greatest acreage given up by any tribe to facilitate the construction of a main stem dam on the Missouri River in South Dakota" Herbert T. Hoover, Professor--Department of History, University of South Dakota, "Cheyenne River Sioux Tribe: Taking Area History," p.1 (Exhibit 93).

III

In the case at bar, the parties filed pre- and post-trial memoranda on the issues to be addressed by the Court. The Court also heard from the United States amicus curiae.

A six-day bench trial ensued wherein the Court heard the testimony of twenty witnesses and received in evidence 267 exhibits. In addition to the factual and procedural background as set forth above, the Court makes the following specific factual findings:

1. About 1,395,729 acres, or 46.5 percent, of the Cheyenne River Reservation is deeded in fee to members and nonmembers. Approximately 3.7 percent of the reservation consists of lands taken by the United States for use by the Oahe Dam and Reservoir Project. The remaining 49.8 percent of the reservation is held in trust with 442,944 acres consisting of individual allotments which remain in trust and 952,782 acres comprising tribal trust lands. The Court makes no finding as to the percentage breakdown of member and nonmember ownership of the deeded lands.

2. The trust lands are interspersed throughout the reservation but are more densely located along the taken area. About two-thirds of the trust lands border the Missouri and Cheyenne Rivers on the eastern and southern boundaries of the reservation.

3. Of the 1980 population of 7,636 persons within Dewey and Ziebach counties, Indians constituted 58 percent and whites constituted 42 percent of that total. 1990 statistics are not yet available nor is there any breakdown as to the population percentages of members and nonmembers on the Cheyenne River Reservation.

4. The Tribe has always asserted jurisdiction over all hunting and fishing activities on the reservation, including nonmember fee lands and the taken area.

5. The Tribe has not acquiesced to any State assertion of jurisdiction over hunting and fishing activities on the reservation.

Beginning with the passage of the Indian Reorganization Act of 1934, 48 Stat. 984, the Tribe enacted ordinances, promulgated under the authority of Article VII of the Tribal By-Laws and approved by the Bureau of Indian Affairs (BIA), which required nonmembers to obtain a tribal permit to hunt or fish on the reservation.

6. Prior to this lawsuit, both the Tribe and the State enforced their respective game and fish regulations on the lands in dispute. The Tribe enforced its regulations against all violators while the State limited its enforcement efforts to nonmembers.

7. No evidence was presented that the Cheyenne River Sioux Tribal Court has imposed criminal sanctions upon a nonmember who violated the tribal game ordinances.

8. The Tribe has the right to graze stock on the taken area subject to the

corresponding use by the United States Army Corps of Engineers.

9. The Tribe exercises its grazing rights according to the terms of its tribal grazing code. This code, approved by the BIA, allows the Tribe to allocate range units to permittees with the grazing permit issued by the BIA. See 25 C.F.R. part 166 (1989). The grazing unit permittee leases only the grass and cannot refuse to allow a tribal member access to the taking area land for reasonable hunting or fishing purposes, though tribal members are encouraged to inform the permittee beforehand of their intended activity. All of the taking area lands within the reservation have been leased.

10. Hunting and fishing for subsistence purposes by members of the Cheyenne River Tribe is an important cultural, social, and religious activity. Lakota tradition exhorts able-bodied tribal members to care for the

needy, weak, and elderly. Not only does subsistence hunting and fishing further that tradition, it honors a fundamental Lakota philosophy of courage, wisdom, and generosity. Hunting and fishing also were necessary to the survival of the early American Indians.

11. Despite the importance to tribal members of hunting and fishing for subsistence purposes, it does not appear that subsistence hunting and fishing is widely practiced by present Cheyenne River Sioux Indians.

12. Tribal regulation of nonmember hunting on the taken area and nonmember fee lands is not necessary to protect hunting by tribal members for subsistence purposes. Deer harvested by nonmember hunters on the taken area and the nonmember fee lands does reduce the amount of deer available to tribal members. This reduction, however, does not decrease subsistence hunting by members as

few deer are harvested by members for subsistence purposes.

13. The State has established that the Tribe itself, in setting licensing fees and season limits, places greater management emphasis on recreation hunting than on subsistence hunting. The tribal wildlife management program does not monitor subsistence hunting nor has the Tribe ever closed a season with the stated purpose of assuring adequate subsistence hunting as opposed to assuring adequate recreational hunting by tribal members.

14. Only a small amount of hunting by tribal members is conducted for subsistence purposes, therefore, hunting activities of nonmembers on the taken area and fee lands would not make it more difficult for tribal members to successfully subsistence hunt on the reservation.

15. The past subsistence needs of tribal members have been met despite nonmember hunting on the taken area and fee lands. Indeed, often more big game and small game tribal licenses were sold to nonmembers than to members. Thus, the taken area and fee lands are not substantial food sources for tribal members.

16. Tribal regulation of nonmember fishing on the shoreline of the taken area is not necessary to protect fishing by tribal members for subsistence purposes. The State proved that subsistence fishing by members on the taken area is not a substantial source of food for tribal members.

17. Tribal lands contribute to the well-being of the deer herds on the taking area and on nonmember fee lands. Virtually all the land adjacent to the taking area is trust land. As a white tail deer may move up to twelve miles across its home range, all

reservations lands, whether trust, deeded or public, sustain deer populations. An effective state or tribal wildlife management program necessarily must encompass the entire reservation.

18. Generally nonmembers hunting and fishing on the reservation have conducted themselves in a manner that does not threaten the legitimate tribal concerns for livestock grazing and protection of other property. Although nonmembers may have harassed cattle grazing on the taken area or on tribal lands, failed to close pasture gates, or let down wires on fences, this conduct has not been so extreme and pervasive as to warrant extraordinary enforcement efforts by state or tribal game officers. Hunting and fishing by members on these lands has resulted in many of the same unlawful or improper acts towards the personal property of landowners and grazing permittees.

19. Federal agencies like the BIA, the U.S. Fish & Wildlife Service, and the U.S. Army Corps of Engineers cooperate with state and tribal governments in promoting fish and wildlife conservation and public recreation. For example, federal funds are made available through the Dingell-Johnson Act, 16 U.S.C. § 777 (1989), the Endangered Species Act, 16 U.S.C. § 1531, and the Indian Self-Determination and Education Assistance Act, Pub. L. No. 93-638, 88 Stat. 2203 (codified at 25 U.S.C. §§ 450 et seq. (1975) (hereafter Indian Self-Determination Act). South Dakota, through its Pheasants for Everyone program, complements the Conservation Reserve Program, 7 C.F.R. part 704 (1990), of the Agricultural Stabilization and Conservation Service by contracting with farmers to grow wildlife food plots on idled CRP land.

20. Neither the State nor the Tribe can lay claim to a program of wildlife management without crediting federal agencies with some financial and management assistance. Moreover, federal assistance is not an intimation of regulatory jurisdiction.

21. The economic security of the Cheyenne River Tribe would not be threatened if prohibited from regulating the hunting and fishing activities of nonmembers on the deeded lands and taken area. Although the Tribe has regulated nonmember sportsmen on the reservation, it has not been successful in developing a recreational hunting and fishing industry that would generate revenues to defray the cost of a large-scale management program. Preservation and development of tribal resources is carried out primarily by enforcement of tribal regulations.

22. In the 1930's and the 1940's the Tribe had made significant inroads into wildlife management. Notwithstanding its earlier success, inadequate funding has prevented the tribe from sustaining an independent and vigorous scheme of wildlife management on the reservation. Certain management activities of the Tribe, like fish stocking and exchange programs, have been limited and little documentation exists since 1984.

23. Until 1989, no ongoing fish or wildlife surveys for the collection of harvest and population data were conducted by the tribal game, fish and parks department. Also, the Tribe had no established conservation, depredation, or stocking programs to protect and enhance existing fish and wildlife resources.

24. A single wildlife biologist employed by the Aberdeen-area BIA was available to advise and assist the tribe. This biologist also

serves fourteen other reservations in three states, all under the administration of the Aberdeen-area BIA office. Except for the BIA wildlife biologist, tribal conservation personnel have little or no background in biology or wildlife management. For example, training courses in wildlife management for tribal game wardens were virtually nonexistent before 1989. As a result, the tribal council has had to rely upon estimates and recommendations of state game officials in setting bag and season limits.

25. In 1989, the Tribe contracted for wildlife biologist and management consultant services with Lower Brule Wildlife Enterprise. Funding for assistance in developing a wildlife management program was requested by the Tribe prior to November 1988 and later was provided by the Department of the Interior pursuant to a P.L. 638 contract with the Tribe.

26. The tribal wildlife management program written by the contract biologist service employs scientific data collection and management techniques. The reservation-wide program seeks to maximize annual harvestable surpluses to meet the present and future economic, recreational, and aesthetic needs of tribal members. No data compilations or reports are available yet to gauge the program's strengths and weaknesses, nor is there any evidence as to the successful implementation of the new wildlife management plan.

27. After the needs of tribal members have been met, the tribal wildlife program provides for consumptive and non-consumptive opportunities for others.

28. The Tribe has been unsuccessful in developing the Oahe fishery. Little revenue is raised by the sale of fishing licenses to nonmembers and other fishing-related

development, i.e., campgrounds, resorts, tourist attractions, baitshops and novelty items, is virtually nonexistent.

29. The State of South Dakota implemented a comprehensive wildlife regulatory program in the early years of its statehood. The function and structure of the South Dakota Department of Game, Fish and Parks has expanded to serve changing public and environmental demands since that time.

30. Recreational hunting generates revenues sufficient to justify substantial expenditures for South Dakota's wildlife management program.

31. The State has a large staff of highly educated and experienced wildlife conservation personnel. The wildlife surveys for the area are comprehensive scientific tools for monitoring harvest and population data. State programs for habitat improvement, depredation control, and

wildlife conservation, including pervasive law enforcement measures and field-level recommendations by conservation officers, have been successful in promoting manageable wildlife populations in Dewey and Ziebach counties.

32. Fisheries management is an integral part of the State's general recreation plan. Lake Oahe boasts of a spawning and imprint station above the dam in the Whitlock reservoir. Walleye and northern pike fishing in the Lake Oahe area are recognized as among the best in the nation. South Dakota stocked the Oahe area with approximately 72 million fish during the period from 1970 to 1988, including a wide array of sport fishing species like rainbow trout, smallmouth bass, walleye, and chinook salmon. Fish stocking studies monitor the success of a particular stocking effort. The State conducts fish population surveys for use in determining its

fishing regulations as well as studies to determine fishing pressure, catch rates and harvest information on the lakes on the Missouri River. Numerous other studies and surveys monitor particular aspects of fisheries management on Lake Oahe. In addition, the State submits annual Missouri River water level recommendations to the Corps of Engineers with the goal of improving recreational fishing and protecting endangered species. Enforcement of fishing regulations also furthers fisheries management. Finally, South Dakota invests a substantial sum of money, along with joint funding from various federal programs, in developing its recreational fishery on Lake Oahe. In return for its investment, the State generates substantial revenue through the sale of licenses and through enhanced tourism.

33. Neither the taken area nor the fee lands constitute a pristine area. The Tribe has never denied general nonmember access to the taking area or fee lands nor does the Tribe monitor nonmember access to the taken area or fee lands. In addition, there has been no showing by the Tribe that unique cultural, spiritual, or religious significance attaches to the taken area or the fee lands.

34. The Tribe has no general scheme to define the essential character of the reservation lands. Nonmember fee lands are interspersed throughout the reservation in a checkerboard fashion. The reservation consists primarily of range and farm land. There is little industrial development and only a few sparsely populated communities.

35. The Tribe discriminates against nonmembers in the application of its hunting and fishing programs. Discrimination in setting season limits is most obvious in the

deer seasons with restrictions upon nonmembers regarding season closings and deer type, sex and age that are not applicable to member hunters.

36. The tribal game, fish and parks department sets licensing fees and season limits without regard to member subsistence hunting and in a manner which discriminates against nonmembers. The discriminatory licensing fees apply to nearly every animal hunted or trapped on the reservation. These restrictions apply whether the lands being hunted are trust, deeded or public lands.

37. The State hunting program, on the other hand, does not discriminate against Indian or nonmember hunters in setting fees and season limits. In addition, state conservation programs, like the Pheasants for Everyone program and the predator program, encourage participation by both members and nonmembers.

38. The State does not discriminate against members or nonmembers fishing on the Missouri River. State fish stocking efforts include rivers that run through the reservation.

39. The Cheyenne River Tribe's political integrity will not be diminished as it still retains exclusive regulatory jurisdiction over the trust land and regulatory jurisdiction over its members throughout the reservation.

40. In sum, the Tribe need not regulate the hunting and fishing activities of nonmembers on the taken area and the nonmember fee lands to protect its political integrity, economic security, or health or welfare.

ISSUES

The following issues are presented by the record in this case:

- I. Did the Tribe threaten impermissible criminal sanctions against those nonmembers who

violate the tribal licensing regulations?

II. Were the Cheyenne River Reservation boundaries disestablished as a result of the Act of 1908 and the Cheyenne River Act?

III. Does the Tribe have civil jurisdiction to regulate hunting and fishing by nonmembers on the taken area and nonmember fee lands?

DISCUSSION OF ARGUMENTS AND AUTHORITIES

I

The Court first turns to the question whether enforcement of the tribal game ordinance would include the imposition of criminal sanctions against nonmembers. A tribe's criminal jurisdiction over its members is "part of retained tribal sovereignty, not a delegation of authority from the Federal Government." Duro v. Reina, 110 S. Ct. at 2060; see also United States v.

Wheeler, 435 U.S. 313, 323, 98 S. Ct. 1079, 55 L. Ed. 2d 303 (1978). The opposite is true in relations with nonmembers, though, because tribes lack the power to prescribe and enforce rules of conduct against nonmembers through criminal sanctions. As sovereigns dependent upon the dominant political will of the federal government, "Indian tribes . . . necessarily give up their power to try nonmember citizens of the United States except in a manner manner acceptable to Congress." See Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 210, 98 S. Ct. 1011, 55 L. Ed. 2d 209 (1978). Thus Congress must affirmatively delegate to a tribe criminal jurisdiction over nonmembers. Id. Inasmuch as Congress created federal criminal jurisdiction over offenses committed by nonmembers in Indian country, which includes all land within the limits of the reservation, no grant of criminal authority

over nonmembers exists in the tribes. 18 U.S.C. §§ 1151 et seq. Indian tribes must look to Congress or the states for prosecution of crimes committed by nonmembers upon Indian lands. See Duro, 110 S. Ct. at 2057 n.1; Public Law 280, Act of Aug. 15, 1953, 67 Stat. 588 (codified as amended at 18 U.S.C. § 1162, 25 U.S.C. §§ 1321-1326, 28 U.S.C. §1360) (hereafter P.L. 280).

In this action South Dakota seeks to prohibit the tribal defendants from asserting criminal jurisdiction over nonmembers who are in violation of tribal licensing regulations. This Court previously declined to dismiss this count of the complaint on the grounds that its disposition should await the parties' factual presentation. Having reviewed the briefs on the motion for dismissal and having heard the testimony at trial, this Court concludes that the State's first count must be dismissed for lack of a

justiciable case or controversy under Article III of the U.S. Constitution.

Throughout this litigation the tribal defendants have disavowed any criminal jurisdiction over nonmembers, claiming that the available sanctions are purely civil in nature. The State, on the other hand, asserts that tribal enforcement of its hunting and fishing code will be accomplished through impermissible criminal sanctions. However that may be, this Court cannot speculate as to whether tribal enforcement of its game ordinances will be accomplished through civil or criminal sanctions when no actual conflict has been presented by the State.

The tribal defendants raise the specter of National Farmers Union Ins. Co. v. Crow Tribe of Indians, 471 U.S. 845, 105 S. Ct. 2447, 85 L. Ed. 2d 818 (1985), for the proposition that scrutiny of the enforcement provisions of the game ordinance rests

initially with the tribal court. Indeed, National Farmers supports this position, saying:

. . . [T]he existence and extent of a tribal court's jurisdiction will require will require a careful examination of tribal sovereignty

* * *

We believe that examination should be conducted in the first instance in the Tribal Court itself. Our cases have often recognized that Congress is committed to a policy of supporting tribal self-government and self-determination. That policy favors a rule that will provide the forum whose jurisdiction is being challenged the first opportunity to evaluate the factual and legal bases for the challenge.

Id. at 856.

According to the evidence presented at trial, the Cheyenne River Sioux Tribe Court has never imposed criminal sanctions upon nonmember transgressors. Moreover, a recent decision of the Tribal Court unequivocally limits tribal enforcement over nonmember hunting and fishing activities on the

reservation "by means of civil ordinances and laws" Cheyenne River Sioux Tribe v. Key, slip op. at 4 (Cheyenne River Sioux Tribal Court filed Jan. 31, 1990). Without commenting on the source of authority upon which the Tribal Court relies in reaching its conclusion, the decision ultimately restricts tribal sanctions against nonmembers to those generally recognized as civil in nature.

The tribal enforcement provisions do not establish a brightline between the available civil and criminal penalties. But, until this Court is called upon to determine whether an actual judgment of the Tribal Court exacts a criminal rather than a civil penalty against a nonmember violator of the tribal game ordinance, this purported controversy lacks "sufficient immediacy and reality." Granville House, Inc. v. Department of H.E.W., 772 F.2d 451, 455 (8th Cir. 1985), appeal after remand, 796 F.2d

1046 (1986), vacated, 813 F.2d 881 (1987). See also, Rincon Band of Mission Indians v. County of San Diego, 495 F.2d 1, 6 (9th Cir. 1974); Hodel v. Irving, 481 U.S. 704, 107 S. Ct. 2076, 95 L. Ed. 2d 668 (1987). Dismissal of the State's first prayer for relief therefore is warranted at this time.

II

The second issue to be addressed by the Court is whether Congress has altered the reservation boundaries thereby depriving the Tribe of jurisdiction over nonmember activities on the disestablished lands. Subject to certain limitations, a tribe can exercise civil regulatory authority over conduct that takes place only on its reservation. If Congress has disestablished the reservation boundaries and has not reserved tribal regulatory authority, the tribe has no jurisdiction over Indian or nonmember activities on the disestablished

portion. But, if no disestablishment has occurred, "treaty-established jurisdiction would preempt the application of state . . . laws on the reservation, . . . except to the extent that the Tribe's rights have been abrogated by subsequent congressional action." Lower Brule Sioux Tribe v. South Dakota, 711 F.2d 809, 815 (8th Cir. 1983), cert. denied, 464 U.S. 1042, 104 S. Ct. 707, 79 L. Ed. 2d 171 (1984) (citing Rosebud Sioux Tribe v. Kneip, 430 U.S. 584, 97 S. Ct. 1361, 51 L. Ed. 2d 660 (1977); DeCoteau v. District County Court, 420 U.S. 425, 95 S. Ct. 1082, 43 L. Ed. 2d 300 (1975)).

Other courts, including the United States Supreme Court, frequently have addressed disestablishment questions of this nature. An intention to disestablish reservation boundaries is not lightly imputed to Congress. Instead, Congress must affirmatively alter established reservation

boundaries in unmistakable terms. See Rosebud Sioux Tribe v. Kneip, 430 U.S. at 586; DeCoteau v. District County Court, 420 U.S. 444; Lower Brule Sioux Tribe v. South Dakota, 711 F.2d at 815-16. The "face of the Act" or "the surrounding circumstances and legislative history" must be examined to divine Congress' intent. Mattz v. Arnett, 412 U.S. 481, 505, 93 S. Ct. 2245, 37 L. Ed. 2d 92 (1973). Finally, "traditional solicitude for the Indian tribes" directs that any legislative ambiguity or doubtful expressions of disestablishment must be resolved in their favor. See Solem v. Bartlett, 465 U.S. 463, 472, 104 S. Ct. 1161, 79 L. Ed. 2d 443 (1984).

A

The United States Supreme Court held in Solem v. Bartlett, supra, that the Act of 1908, which opened to settlement 1.6 million acres of surplus or unallotted lands in the

Cheyenne River Reservation, did not affect the original reservation boundaries established by the Act of 1889. Bartlett, 465 U.S. at 481. See also United States v. Dupris, 612 F.2d 319 (8th Cir. 1979), vacated and remanded on other grounds, 446 U.S. 980, 100 S. Ct. 2959, 64 L. Ed. 2d 836 (1980); United States v. Long Elk, 565 F.2d 1032 (8th Cir. 1977); and United States ex rel. Condon v. Erickson, 478 F.2d 684 (8th Cir. 1973). The Bartlett Court held that Congress did not expressly state that the allotment would result in a disestablishment of the original boundaries and that neither the legislative history nor any later congressional action clearly indicates such a disestablishment. Bartlett, 465 U.S. at 481. Because reservation lands owned in fee by nonmembers passed to them directly or indirectly as a result of the Act of 1908, the Tribe may have

civil jurisdiction on the deeded lands within the originally-established boundaries.

B

Moreover, there is no "substantial and compelling evidence of a congressional intent to disestablish Indian lands" taken as a result of the Act of September 3, 1954, Pub. L. No. 83-776, 68 Stat. 1191 (hereafter Cheyenne River Act). See Bartlett, 465 U.S. at 472. On this issue, the Court finds instructive the Eighth Circuit Court of Appeals' opinion in Lower Brule Sioux Tribe v. South Dakota, supra. An examination of the takings accomplished by the Big Bend Act, Pub. L. No. 87-734, 76 Stat. 698 (1962), and the Fort Randall Act, Pub. L. No. 85-923, 72 Stat. 1773 (1958) [sister Acts to the Cheyenne River Act], led the appeals court to conclude that no disestablishment of the Lower Brule Indian Reservation had occurred. See Lower Brule, 711 F.2d at 821.

Like the Big Bend and Fort Randall Acts, the Cheyenne River Act was one of seven taking statutes enacted to compensate the tribes and their members for Flood Control Project lands taken by the Corps of Engineers. Id. at 813 n.1 (citations to Acts). Lower Brule held that despite Congress' use of the words "as diminished" in four of the taking statutes when referring to the reservation -- including the Cheyenne River Act -- no congressional intent to disestablish was found in the Big Bend and Fort Randall Acts. Lower Brule attributed the different wording found in the statutes to diverse formats and drafting styles rather than evidence of a variation in congressional intent. Id. at 821 n.13. Significantly on this point, the Eighth Circuit stated:

. . . the district court's conflicting conclusions on the disestablishment question with regard to the Fort Randall and Big Bend Acts imputes to Congress a

very impractical and unlikely purpose with respect to flood control on the Missouri River. If the court below was correct, it would mean that in acquiring the land necessary for the comprehensive Missouri River Basin Project through the seven taking statutes, . . . Congress in the first Act . . . and the last two Acts . . . preserved existing reservation boundaries, but in the middle four Acts . . ., by inclusion of the words "as diminished," it did not do so. There simply is no indication that Congress intended to create such an unusual and impractical result.

Id. at 820-21.

South Dakota nevertheless asserts that the Cheyenne River Act expressly disestablished the reservation. In relevant part, § 11 of the Cheyenne River Act states as follows:

. . . . The lands so selected and purchased as substitute allotments may be either within the boundaries of the Cheyenne River Reservation as diminished by this agreement or outside said reservation as may meet the desires of the individuals involved in the several transactions.

68 Stat. 1191, § 11 (emphasis supplied).

Conceded that in the light of Solem and Lower Brule this statement by itself does not satisfy the "unmistakable terms" requirement for a disestablishment, the State contends that other provisions of the Cheyenne River Act in combination with the above-quoted sentence lead to a conclusion that Congress clearly intended a disestablishment of the reservation. Notably, § 1 of the Cheyenne River Act provides that the Tribe:

. . . does hereby convey to the United States all tribal, allotted, assigned, and inherited lands or interests within said Cheyenne River Reservation belonging to the Indians of said reservation

68 Stat. 1191, § 1.

According to the State, the Tribe's transfer of all title and interest in the project lands to the federal government worked a disestablishment of the reservation along the taken line of the Missouri River.

South Dakota's interpretation of § 1, however, is incompatible with later sections of the Cheyenne River Act which expressly reserve in the Tribe specific rights and interests in the taken lands. For example, § 6 provides for the Tribe's retention of mineral rights in the taking area. Section 7 reserved the right to cut and remove timber from the taken area. Finally, § 10 provides that tribal members shall have grazing rights in the taking area and "the right of free access to the shoreline of the reservoir, including the right to hunt and fish in and on the aforesaid shoreline and reservoir[.]" In sum, a conveyance to the United States of all of the Tribe's interests in the project lands is not a clear expression of disestablishment of the reservation boundaries when followed by a litany of reserved rights and privileges.

Moreover, § 2 of the Cheyenne River Act provides for a sum certain to be paid to the Tribe, "in final and complete settlement of all claims, rights, and demands of said Tribe or allottees[.]" 68 Stat. 1191, § 2. The Eighth Circuit twice has ruled that a nearly identical provision fell short of a clear expression to alter a reservation's boundaries. See Lower Brule, 711 F.2d at 816-17, 819; United States v. Wounded Knee, 596 F.2d 790 (8th Cir.), cert. denied, 442 U.S. 921, 99 S. Ct. 2847, 61 L. Ed. 2d 289 (1979). With little discussion, the Appeals Court concluded that "[t]his language falls short of that utilized by Congress when it has unequivocally expressed its intent to disestablish a reservation's boundaries." Such brevity is compelling and, in this case, correct. Far from a clear expression of intention to disestablish reservation boundaries, the face of the Cheyenne River

Act is ambiguous, and at best equivocal, on this subject.

The Act's legislative history does not evince a congressional intention to alter reservation boundaries. The "as diminished" language of § 11 received identical treatment by the Senate and House Committees on Interior and Insular Affairs. The report of the House Committee provided simply that the "lands so purchased as substitute allotments may be either within or without the boundaries of the Cheyenne River Reservation", entirely omitting the "as diminished" language of the bill. H.R. Rep. No. 2484. 83d Cong., 2d Sess. 8. A report of the Department of the Army, which was included in the Committee Report, did not even discuss § 11. Id. at 9-12. The attached report of the Secretary of the Interior, however, included the "as diminished" phrase when it recommended that

substitute allotments be conveyed in "restricted fee" to the individual Indians. Id. at 14. Yet that report does not elaborate on the disestablishment of reservation boundaries.

In the Senate, the report of the Committee on Interior and Insular Affairs also omitted the "as diminished" language of § 11 in its sectional analysis of the bill. See S. Rep. No. 2489, 83d Cong., 2d Sess. 5. And the reports of the Secretary of the Interior and the Department of the Army run true to form with their reports to the House Committee. Id. at 8, 9-12. Significantly, though, all the committee reports do not elaborate on the effect of the Cheyenne River Act upon the reservation boundaries. In sum, the legislative history of the Cheyenne River Act reflects little, if any, treatment of the disestablishment question.

Finally, circumstances surrounding the taking of the reservation lands do not support a finding of disestablishment. Before it could be effective, § 1 of the Cheyenne River Act, included at the behest of the Tribe, required strict observance of Article 12 of the Treaty of April 29, 1868. Article 12 requires a three-fourths vote of approval by tribal members before any cession of reservation lands can be valid and enforceable against them. The following excerpt from a Memorial presented by the Tribe to Congress, conveyed its concerns if the Cheyenne River Act was not ratified by the required number of votes:

If we should now abandon our insistence that three-quarters of the adults ratify the Act which results from the Oahe bills, we would be abandoning our own Treaty. We would be consenting to a violation of Article XII of that Treaty. It would be a shameful thing for us, as one of the divisions of the Sioux Nation, to abandon and break Article XII of

the 1868 Treaty. We have for so many years insisted and still are insisting that the 1868 Treaty and Article XII thereof govern our land claim. From our side we do not wish to be branded as traitors by the people of the Reservations who live by and under the Treaty of 1868.

But what about the Government of the United States? Does the Department of the Interior wish to have conveyed part of the title or a questionable title or an invalid title? Does the Interior Department wish to lay the basis for future litigation? . . .

Memorial to the 83rd Congress in regard to Oahe Project South Dakota, S. 695 and H.R. 2233, presented by the Negotiating Committee of the Cheyenne River Sioux Tribal Council, 3-4 (May 20, 1954) (see Hearing before the Joint Senate-House Committee on Interior and Insular Affairs, S. Doc. No. 695, H.R. Doc. No. 2233, 83rd Cong., 2d Sess. 215 (May 20, 1954)) (hereafter Tribal Memorial). Congress acquiesced and the Cheyenne River Act was later approved by 92 percent of the voting tribal members.

The Tribal Memorial points to a desire on the part of the Tribe to finally and completely convey to the United States those lands required for the Oahe Reservoir. The tribal vote does not, however, express unmistakably a desire to alter existing reservation boundaries. The fact that the Tribe voted to convey limited title to lands necessary for the federal project does not positively denote a relinquishment of tribal jurisdiction over those lands. "Congressional action removing certain reservation land from Indian ownership does not necessarily disestablish reservation boundaries." Lower Brule, 711 F.2d at 815. A change in reservation boundaries, therefore, is not imperative to diminishing the land size of a reservation. See Condon v. Erickson, 478 F.2d at 688.

In its discussion of § 11, the Tribal Memorial makes clear that the Tribe did not

contemplate the disestablishment of reservation boundaries as a result of the takings. The Tribe understood that the Interior Department was "endeavoring to terminate the trust status of a very large body of land" within the reservation. Tribal Memorial at 24. The Tribe's only concern was with the continued trust status of substitute allotments and not with the possible disestablishment of its reservation boundaries. Ostensibly, then, the disestablishment issue did not even command the attention of the Tribe itself, which says something of its prominence in the formation of the Oahe bills to be voted upon.

The Cheyenne River Act did not disestablish the Missouri River boundary of the Cheyenne River Reservation. The face of the Act itself is not "'precisely suited' to evince Congress' intent to disestablish reservation boundaries." Lower Brule, 711

F.2d at 816. Nor do the legislative history of the Act and the circumstances surrounding its passage and implementation point unmistakably to the conclusion that Congress intended to exclude the taking area from the Cheyenne River Reservation. Id. at 815.

III

The last issue to be resolved is whether the Tribe has the authority to regulate hunting and fishing by nonmembers on lands owned by nonmembers or the United States but which lie within the boundaries of the reservation. The following discussion of general Indian law principles leads this Court to conclude that tribal civil jurisdiction does not reach the hunting and fishing activities of nonmembers on the fee lands or taken area.

A tribe's powers in relations between it and its members upon its territory are akin to those of a sovereign nation. See United

States v. Wheeler, supra. The powers of a tribe in relations between it and nonmembers are diminished, however, because of its dependence upon the federal government. The tribe as quasi-sovereign is divested of any inherent power to exercise criminal jurisdiction over nonmembers. Duro v. Reina, 110 S. Ct. 2053, 58 U.S.L.W. at 4645; Oliphant, 435 U.S. at 212. Although the tribe's civil jurisdiction over nonmembers is not so divested, its power to regulate generally the conduct of nonmembers on reservation lands no longer held by or for the benefit of the tribe or its members is greatly diminished. See Brendale v. Confederated Tribes and Bands of Yakima Indian Nation, 492 U.S. ---, 109 S. Ct. 2994, 106 L. Ed. 2d 343 (1989) (plurality opinion); Montana v. United States, 450 U.S. 544, 101 S. Ct. 1245, 67 L. Ed. 2d 493 (1981); United States v. Anderson, 736 F.2d 1358 (9th Cir.

1984). The United States Supreme Court has identified three situations in which the exercise of tribal civil jurisdiction over nonmembers on non-tribal land may be appropriate: (1) where Congress has expressly delegated jurisdiction to the tribe; (2) where a nonmember has essentially consented to tribal jurisdiction through a business relationship or otherwise; and (3) where the conduct of the nonmember imperils the tribe's political integrity, economic security, or health and welfare. *Id.*

To rule on the case as pleaded first requires that the Court dispose of two side issues raised in the briefs. Initially, this Court need not engage in a lengthy abrogation analysis as was required of the Eighth Circuit in *Lower Brule*. See *Lower Brule*, 711 F.2d at 821-27. The district court in *Lower Brule* erroneously concluded that South Dakota possessed exclusive jurisdiction to regulate

hunting and fishing by all persons within the Fort Randall and Big Bend taking area. See *Lower Brule Sioux Tribe v. South Dakota*, 540 F. Supp. 276, 287 (D.S.D. 1982), *rev'd*, 711 F.2d 809 (8th Cir. 1983). The basis for this conclusion was that a disestablishment of the Lower Brule reservation had occurred and that tribal jurisdiction over hunting and fishing by tribal members had been abrogated by Congress. But this Court has not been called upon to decide whether the Tribe has regulatory jurisdiction over hunting and fishing by tribal members on the taken area and on nonmember fee lands within the reservation. Although the State raised that issue in its trial brief, the State's complaint asks only that the Court declare the extent of tribal jurisdiction as it affects nonmembers on the lands in dispute.

Second, the question of state jurisdiction on the taken area or fee lands

has been raised in the briefs and orders of the Court. However, the State, limited to its complaint, has not asked this Court to decide whether South Dakota has jurisdiction over nonmember hunting and fishing on the taken area and nonmember fee lands. The tribal defendants succinctly stated the limits of the Court's inquiry:

It is important to note that this case does not involve the question of whether the state may also have jurisdiction over non-Indian activities on the taking area and deeded lands. The state, of course, is the plaintiff in this case. Its complaint seeks only to prohibit the exercise of tribal jurisdiction, not to establish the existence of state jurisdiction. . . . Nor did the tribal defendants counter claim for such relief. . . . Thus the pleadings in this case are insufficient to raise the question of whether the exercise of state jurisdiction on the reservation lands is preempted by tribal jurisdiction. That is how the parties tried the case as well. The state, for example, made no attempt to show how its interests would be injured if the tribe were to exercise exclusive jurisdiction

over the areas in dispute. Similarly, the evidence presented by the tribal defendants was aimed at demonstrating the need for tribal jurisdiction and not whether state jurisdiction should be precluded because it interferes with the achievement of tribal and federal objectives.

Tribal Defendants' Post Trial Memorandum, p. 5 (February 26, 1990).

The State disagrees with this statement. This Court, however, concludes that this case does not involve issues of preemption or tribal regulatory authority over nonmembers on tribal lands. See, e.g., Cotton Petroleum Corp. v. New Mexico, 490 U.S. ---, 109 S. Ct. 1698, 104 L. Ed. 2d 209 (1989); New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 130 S. Ct. 2378, 76 L. Ed. 2d 611 (1983); Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 102 S. Ct. 894, 71 L. Ed. 2d 21 (1982); White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 100 S. Ct. 2578, 65 L. Ed. 2d 665 (1980); Ramah Navajo School Bd., Inc. v.

Bureau of Revenue of New Mexico, 458 U.S. 832, 102 S. Ct. 3394, 73 L. Ed. 2d 1174 (1982). Thus, the Court's attention turns to the single question before it: whether the Tribe can regulate hunting and fishing by nonmembers within the taken area and upon nonmember fee lands.

A

The United States Supreme Court previously has addressed the issue whether a tribe has authority to regulate hunting and fishing by nonmembers on nonmember fee lands within the reservation. Montana v. United States, *supra*, involved a claim by the Crow Tribe of Montana that it, and not the state, had the authority to regulate hunting and fishing by nonmembers on non-Indian lands within reservation boundaries. In holding for the state, the Montana Court articulated a presumption that the relational law of the federal government and Indian tribes provides

that the "exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation."²⁷

²⁷Termed the "implied limitations doctrine." this tenet posits that retained sovereign powers of the Indian tribes were limited but not abolished as a result of their dependence on the United States. See F. Cohen, Handbook of Federal Indian Law 231 (1982 ed.). Certain retained powers were explicitly divested by treaty or congressional act. See Note, Tribal Power to Zone Nonmember Land Within Reservations: The Uncertain Status of Retained Tribal Power Over Nonmembers, 21 Ariz. St. L.J. 769, 774-79 (1989). Other powers were implicitly divested, however, as inconsistent with the dependent status of tribes. Cf. Oliphant, *supra*. Generally, inconsistent powers are those involving the external relations of a tribe. See, e.g., United States v. Wheeler, 435 U.S. 313, 98 S. Ct. 1079, 55 L. Ed. 2d 303 (1978); Knight v. Shoshone & Arapaho Tribes, 670 F.2d 900 (10th Cir. 1982); Cardin v. De La Cruz, 671 F.2d 363 (9th Cir. 1982). Thus, Montana has not been applied by the Supreme Court in cases involving tribal

(Footnote Continued)

Montana, 450 U.S. at 564. See also Mescalero Apache Tribe v. Jones, 411 U.S. 145, 93 S. Ct. 1267, 36 L. Ed. 2d 114 (1973); Williams v. Lee, 358 U.S. 217, 79 S. Ct. 269, 3 L. Ed. 2d 251 (1959); McClanahan v. Arizona Tax Comm'n, 411 U.S. 164, 93 S. Ct. 1257, 36 L. Ed. 2d 129 (1973); United States v. Kagama, 118 U.S. 375, 6 S. Ct. 1109, 30 L. Ed. 228 (1886) (United States may govern tribes within the geographical boundaries of the Nation by acts of Congress rather than controlling them by treaties).

The United States Supreme Court is divided over the issue whether Montana reverses traditional Indian law principles by

(Footnote Continued)
sovereignty over tribal members on tribal land, i.e., matters of internal relations. See Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 102 S. Ct. 894, 71 L. Ed. 2d 21 (1982); Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 107 S. Ct. 971, 94 L. Ed. 2d 10 (1987).

establishing a presumption that tribes lack civil jurisdiction over nonmembers unless such authority is affirmatively delegated by Congress. This division was apparent in the Court's recent opinion in Brendale v. Confederated Tribes and Bands of Yakima Indian Nation, *supra*. In the separate opinions of Justices White and Blackmun, the presumption issue surfaced when both sought to clarify Congress' role in authorizing tribal regulatory jurisdiction over nonmembers.

As the author of the decision of the Court as to the "open area," Justice White relied on Montana and Wheeler as support for the principle that, where "[a]n Indian tribe's treaty power to exclude nonmembers of the tribe from its lands" has been abrogated, Congress must affirmatively delegate to the tribe civil jurisdiction over nonmembers for such authority to exist. Brendale, 109 S.

Ct. at 3006. Implicit divestiture of authority follows as "regulation of 'the relations between an Indian tribe and nonmembers of the tribe' is necessarily inconsistent with a tribe's dependent status" Id.

Joined in his opinion by only two other members of the Court, Justice Blackmun argued that Justice White's reading of the "general principle" fashioned in Montana ignores a longstanding presumption which retains tribal civil jurisdiction to regulate nonmember conduct on the reservation. Id. at 3018. Justice Blackmun wrote, "'Civil jurisdiction over . . . activities [of non-Indians on reservation lands] presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute.'" Id. at 3020 (citing Iowa Mutual Ins. Co. v. LaPlante, 480 U.S. 9, 107 S. Ct. 971, 94 L. Ed. 2d 10 (1987)).

Justice Blackmun stated, however, that "to recognize that Montana strangely reversed the otherwise consistent presumption in favor of inherent tribal sovereignty over reservation lands is not to excise the decision from our jurisprudence." Brendale, 109 S. Ct. at 3021. The case still protects "significant tribal interests" which are "threatened or directly affected" as a result of on-reservation conduct by nonmembers. Id. at 3022. Therefore, Montana's misreading of Indian-law jurisprudence is, in effect, offset by its solicitude for sovereignty jurisprudence. Id.

The effect of these opinions on Montana is unclear, and the opinion of Justice Stevens does little to clarify the discussion. Justice Stevens, who delivered the opinion of the Court in Brendale as to the "closed area," asserted that the power to exclude nonmembers from reservation lands

includes the lesser power to determine the essential character of the area through land use regulation. Brendale, 109 S. Ct. at 3010. Derived from inherent Indian sovereignty and rights guaranteed it by treaty, a tribe's exercise of its power to define the character of the tribal community may entail the regulation of nonmember activities on lands owned by them. Id. Although the "unadulterated character" of the closed area required tribal zoning authority over nonmembers, Justice Stevens concluded that the tribe had no similar interest in the open area. Id. at 3015.

Justice Stevens focused on the zoning authority context of Brendale and distinguished Montana on its facts. Montana did not "require a different result" because in that case the hunting and fishing regulation discriminated against nonmembers, the nonmembers' conduct did not threaten the

welfare of the tribe, and the state had significant ownership and management interests in the property where the nonmember activity would be carried out. Id. at 3014.

In short, Montana remains viable case law precedent. With this in mind, Montana cannot be distinguished from the facts of this case. This case does not involve land use regulation, i.e., zoning, whereby the purported use of the property by the nonmember would be different than that of any tribal member generally -- both members and nonmembers use the taken area and fee lands for hunting and fishing. This Court found that nonmember hunting and fishing activities pose no more threat to grazing livestock than does the similar conduct of tribal members. The Tribe's licensing regulations are discriminatory, preferring the needs of tribal members before those of nonmembers, both in the issuance of licenses and the fees

charged. In addition, the Court found that the present dispute does not concern lands which, if severed from tribal control, would corrupt a uniquely Indian community. Finally, a significant portion of the reservation is owned by nonmembers and the United States. This Court, in looking to federal law as a source of regulatory jurisdiction, must apply the "general principle" propounded in Montana: unless Congress expressly delegated civil jurisdiction to the Cheyenne River Tribe over nonmember hunting and fishing on the taken area and the nonmember fee lands, no such authority exists in the Tribe. Montana, 450 U.S. at 564. Cf. Application of Otter Tail Power Co., 451 N.W.2d 95, 101 (N.D. 1989) (examined Brendale and applied express congressional delegation analysis).

Article 2 of the 1868 Fort Laramie Treaty granted the Cheyenne River Tribe the "absolute and undisturbed use and occupation" of the territory reserved for it by Congress. This treaty further granted a tribal right to exclude nonmembers from its reservation and, implicitly, to "define the essential character" of the tribal community. See Brendale, 109 S. Ct. at 3010 (opinion of Justice Stevens). But Congress later championed other national interests by enacting legislation which encroached upon the Tribe's right to exclusively use and occupy its reserved territory. In advancing its allotment policy²⁸, Congress passed the Act of 1889 which made it possible for lands

²⁸ See General Allotment Act of 1887, 24 Stat. 388 (codified as amended at 25 U.S.C. §§ 331 et seq.); Solem v. Bartlett, 465 U.S. 463, 104 S. Ct. 1161, 79 L. Ed. 2d 443 (1984).

originally allotted to tribal members to eventually pass by sale or inheritance to nonmembers. Yet the Act retained the reservation status of alienated land. See Mattz v. Arnett, supra. See also Note, Undermining Tribal Regulatory Authority: Brendale v. Confederated Tribes, 13 U. Puget Sound L. Rev. 349 (1990). Thirty years later Congress further diminished tribal ownership of reservation lands when it passed the Act of 1908 and opened unallotted or surplus lands to non-Indian homesteading. Finally, more reservation lands were taken along the Missouri River by the United States pursuant to the Flood Control and Cheyenne River Acts. As a result, the Tribe could no longer exclude any person from lands owned by nonmembers or the United States.

A final consequence of each of these Acts was to alienate certain lands from the Tribe for the benefit of nonmember settlers

or for the United States. As was made clear in Montana:

. . . treaty rights with respect to reservation lands must be read in light of the subsequent alienation of those lands. Accordingly, the language of the 1868 [Fort Laramie] treaty provides no support for tribal authority to regulate hunting and fishing on land owned by the non-Indians.

Montana, 450 U.S. at 561. See also Brendale, 109 S. Ct. at 3003-04 (Justice White's discussion of Yakima Treaty of 1859).

The Act of 1908 reserved for the Cheyenne River Indians "any benefit to which they are entitled under existing treaties or agreements not inconsistent with the provisions of this Act." 35 Stat. 464, § 9 (emphasis supplied). But, because the Tribe alienated certain reservation lands pursuant to the allotment policy regulatory power in the Tribe over those lands now held in fee by nonmembers would be inconsistent with the Act. The 1868 Fort Laramie Treaty did not

grant the Tribe civil jurisdiction over hunting and fishing on land owned by nonmembers. Dispositive of the nonmember fee lands issue is the fact that nowhere in the Act of 1908 does Congress expressly delegate to the Tribe the authority to regulate hunting and fishing by nonmembers on allotted lands.

2

Turning to the taken area, the avowed purpose of the Cheyenne River Act was the acquisition of those lands necessary for the construction of the Oahe Dam and Reservoir Project, not, as was the goal of the Act of 1908, "the ultimate destruction of tribal government." Montana, 450 U.S. at 506 n.9. The Cheyenne River Act dealt primarily with payment to the Tribe for damages resulting from the flooding of its valuable bottomlands. The sum of \$10,644,014 was appropriated in payment for the taken lands

and interests therein. Including loss of wildlife, grazing permit revenue loss, the rehabilitation of all tribal members, the relocation and reestablishment of the displaced tribal members, and the cost of negotiating the agreement. 68 Stat. 1191, §§ 2, 5, and 13. Other unspecified sums were to be appropriated for the relocation of cemeteries and the relocation and reconstruction of Cheyenne River Agency, hospitals, schools, and other public buildings and roads. Id. at §§ 3-4.

Federal damages relief commanded the lion's share of the debate and the negotiations. An appraisal made by Gerald T. Hart and Associates (hereafter Hart appraisal) concluded that the Oahe Dam and Reservoir Project would require the taking of 104,420 acres of the Cheyenne River Reservation at a fair market value of \$1,605,410. The Hart appraisal was

unacceptable to both the Department of the Interior and the Tribe and negotiations ensued to reach an agreement of the value of the land and interests to be conveyed. See S. Rep. No. 2489, 83rd Cong., 2d Sess. 3. Subsequent hearings before the Senate and House Committees, and negotiations with the Corps of Engineers, the Missouri River Basin investigation staff, and a delegation from the tribal council concentrated on the issue of damages, without discussion of tribal authority over nonmember activities on the taken area. See generally House of Representatives, Hearings Before the Committee on Interior and Insular Affairs, Joint Senate and House Subcommittee on Indian Affairs, on H.R. 2233 and S. 695 (May 19, 1954); Tribal Memorial (May 20, 1954); Frank Ducheneaux, et al., "Oahe: Report of Washington Delegation" (January 21-31, 1953); Missouri River Basin Investigation Project

No. 138, "Damage to Indians of Five Reservations from Three Missouri River Reservoirs in North and South Dakota," (April 1954). On the collateral issue of damages, the Court notes that, though the Cheyenne River Act compensated the Tribe for grazing permit revenue loss, the failure of the United States to make additional appropriations to the Tribe for loss of wildlife revenue does not implicitly grant it the right to control wildlife resources and the use thereof by nonmembers.

The Cheyenne River Act expressly granted tribal members certain rights and privileges incidental to hunting and fishing within the exterior boundaries of the reservation. The Act provides in § 10:

. . . [T]he said Indian Tribe and the members thereof shall have the right to graze stock on the land between the level of the reservoir and the taking line. . . . The said Tribal Council and the members of said Indian Tribe shall have,

without cost, the right of free access to the shoreline of the reservoir including the right to hunt and fish in and on the aforesaid shoreline and reservoir, subject, however, to regulations governing the corresponding use by other citizens of the United States.

68 Stat. 1191, § 10.

Nevertheless, an inescapable consequence of the Cheyenne River Act was the transfer of fee ownership from the Tribe to the United States and the abrogation of the Tribe's treaty right to the exclusive use and occupation of the taken lands. The language of the Cheyenne River Act reveals no congressional intention, either express or implied, to delegate to the Tribe civil jurisdiction over nonmembers on the taken area. While § 10 confers hunting and fishing rights upon the Tribe, those rights are restricted regarding the "corresponding use by other citizens of the United States,"

meaning, presumably, nonmembers.²⁹ Giving the words their ordinary meaning, the Court concludes that § 10 does not affirmatively authorize the Tribe to exercise civil jurisdiction over nonmembers on the taken area.

²⁹This is not to say that § 10 expressly endorses the application of state civil jurisdiction over the recreational activities of nonmembers. The Eighth Circuit concluded that an identical "corresponding use" clause in both the Fort Randall and Big Bend Acts:

does not clearly and unambiguously subject the hunting and fishing rights of the Lower Brule Sioux to state regulation. Indeed, the clause makes no explicit reference to state law, and thus, the "regulation" contemplated could be either by the federal government through the Secretary of Army and Corps of Engineers or by the State.

Lower Brule, 711 F.2d at 824.

What is relevant here is not whether this clause grants South Dakota regulatory jurisdiction over nonmembers on the taken area, but whether it expressly delegates that authority to the Tribe.

The legislative history surrounding the passage of the Cheyenne River Act does not compel a different conclusion. The reports of the Secretary of the Army to the House and Senate committees on Interior and Insular Affairs recommended that § 10 be eliminated as it "would involve complications since there are numerous tracts within the reservation which are owned by non-Indians." H.R. Rep. No. 2484, 83d Cong., 2d Sess. 11.; S. Rep. No. 2489, 83d Cong., 2d Sess 12. Otherwise, the agency reports on the bill submitted to Congress request no change. There is no mention of tribal jurisdiction over nonmember hunting and fishing.

An examination of the myriad hearings and negotiations which were held prior to the passage of the Cheyenne River Act illuminates only one instance where a discussion of § 10 addressed tribal jurisdiction on the taken area. Counsel for the Tribe, Mr. Ralph Case,

made this remark in a hearing before the joint Senate and House committee:

Now, the right to hunt and fish is a tribal right. It is still preserved and is still holding. No white citizen of South Dakota can go on this reservation and hunt unless he has first obtained a license from the Tribal Council. Our right to continue hunting and fishing is to us an extremely valid and valuable right. It is an ancient right. It is all that is left of our lives as they existed a hundred years ago.

Hearings before the Committee on Interior and Insular Affairs, S. 695 Joint Hearing, Acquisition of Lands for Oahe Reservation and Indian Rehabilitation, 289 (May 20, 1954).

Read in context, however, it is the Court's understanding that Mr. Case was referring to tribal jurisdiction at the time of the hearing and was not alluding to future jurisdiction of the Tribe over nonmember hunting and fishing once the lands were

actually taken.³⁰ Thus, Mr. Case's use of the word "Now" should preface every statement made in the excerpted paragraph. In any event, this isolated statement falls short of the affirmative congressional action contemplated by Montana.

Circumstances surrounding the Cheyenne River Act indicate that the jurisdiction issue simply was not considered. The Tribal Memorial recommends passage of the bill as submitted and fails to address any jurisdictional conflicts which might result

³⁰The first comments of Mr. Case with regard to § 10 converge on the grazing rights issue. Whether the United States would take fee title to the taken area or merely a flowage easement was a subject of grave concern to tribal members with grazing interests in the bottomlands and required the attention of the committee. Except for the comments of Mr. Case on the continued hunting and fishing rights of the Tribe, however, none of the committee members asked questions on this provision or contributed to the discussion in any way.

therefrom. In addition, a comprehensive report from the Missouri River Basin investigation staff of the Department of the Interior discussed in depth the economic impact upon the Indians which would result from the Oahe and Fort Randall Dam and Reservoir Projects, but also failed to comprehend the jurisdictional problems created by the bill. See generally Missouri River Basin Investigation Project No. 138, "Damage to Indians of Five Reservations from Three Missouri River Reservoirs in North and South Dakota," (April 1954).

It is equally clear that other legislation read in pari materia with the Cheyenne River Act did not grant tribal jurisdiction over nonmembers on nonmember fee lands or the taken area. The Indian Reorganization Act of 1934, 48 Stat. 984 (codified as amended at 25 U.S.C. §§ 461 et seq.), acknowledged and reaffirmed the

governmental authority of the Tribe. This Act sought "to encourage economic development, self-determination, cultural plurality, and the revival of tribalism." F. Cohen, Handbook of Federal Indian Law 147 (1982 ed.). The Tribe's adoption of the provisions of the Indian Reorganization Act did not expand reserved treaty rights, but instead preserved existing treaty rights. The same can be said of P.L. 280 which did not change state jurisdiction over the on-reservation activities of nonmembers nor did it authorize civil jurisdiction over nonmember hunting and fishing on the taken area and fee lands. The statute merely preserved the scope of then-existing tribal jurisdiction. See Bryan v. Itasca County, 426 U.S. 373, 387, 96 S. Ct. 2102, 48 L. Ed. 2d 710 (1976); Cardin v. De La Cruz, 671 F.2d 363 (9th Cir.), cert. denied, 459 U.S. 967, 103 S. Ct. 293, 74 L. Ed. 2d 277 (1982);

White Mountain Apache Tribe v. Arizona, 649 F.2d 1274, 1279 (9th Cir. 1981). Finally, 18 U.S.C. § 1165, the federal trespass statute, authorizes federal jurisdiction over the taken area solely because the Cheyenne River Act granted tribal members hunting and fishing rights on the project lands. This trespass statute expands federal, not tribal, jurisdiction. See generally New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 337-38, 103 S. Ct. 2378, 76 L. Ed. 2d 611 (1983).

The Court is cognizant of the detrimental effect the Cheyenne River Act had upon the Tribe and concurs with this statement by the tribal defendants:

. . . [I]t is plain that the Cheyenne River Sioux Tribe and its members sacrificed the best lands of their reservation in order that this federal project might be built. Whatever the value of the Reservoir to the nation as a whole, it conveyed no benefit on the tribe or tribal members. To the extent that Public Law 776 [Cheyenne River Act] is ambiguous, it should be

interpreted in a fashion that allows the fullest possible protection of the rights that the tribe retained.

Tribal Defendants' Post Trial Memorandum, p. 89 (February 26, 1990). Indeed, the Cheyenne River Act should be construed so as to defend those rights retained by the Tribe. But it cannot be ignored that the right to exclude or regulate nonmembers on land which is owned by the United States for the benefit of the general public is extraneous to the 1868 Fort Laramie Treaty and subsequent federal legislation affecting those treaty rights. The Court, in completing an examination of the Cheyenne River Act, must conclude that, although the Cheyenne River Act acquired only those property interests necessary to the construction of the Oahe Dam and Reservoir Project, Congress did not affirmatively delegate civil jurisdiction to the Tribe over

nonmember hunting and fishing activities on the taken area.

In an exhaustive examination of the Flood Control Act and the Act of September 30, 1950, 64 Stat. 1093 (hereafter Act of 1950), the State traces each Act's history to a conclusion that jurisdiction over nonmembers on the taken lands rest with the State. Without commenting on this conclusion, the Court finds instead that neither Act takes an affirmative step towards delegating jurisdiction over nonmember hunting and fishing on the taken area to the Tribe. The Court's inquiry is limited to whether Congress expressly delegated jurisdiction to the Tribe, not whether Congress intended jurisdiction to pass to the State, or, for that matter, the federal government.

Both the Flood Control Act and the Act of 1950 concerned the acquisition of project

lands and the interests to be conveyed to the United States. There is nothing in the Acts themselves or their discussion on the floors of Congress and in committee that raises the specter of tribal jurisdiction over nonmembers on the taken lands.

Congress, pursuant to § 1 of the Flood Control Act, invoked the dominant jurisdiction of the United States over "the rivers of the Nation" and authorized the construction of works to improve navigation and flood control. The Act accommodates the interests of the affected states in continued access to and use of the rivers and shorelines. The rights of Indian tribes were set aside for the moment as Congress addressed the specific interests of the

various states and tribes through subsequent legislation.³¹

³¹The parties focused much attention on § 4 of the Flood Control Act of 1944. Section 4 allows general public use of the project reservoirs subject to regulation by the Corps of Engineers. The final sentence of § 4 states:

No use of any area to which this section applies shall be permitted which is inconsistent with the laws for the protection of fish and game of the state in which such area is situated.

The Eighth Circuit in Lower Brule disagreed with the district court's conclusion that § 4 of the Flood Control Act of 1944 authorized the application of South Dakota's laws to hunting and fishing activities by tribal members in the Fort Randall and Big Bend taking areas. Lower Brule, 711 F.2d at 825 n.23. In concluding that the provision authorized federal, not state, regulation, the Eighth Circuit noted that, "there is simply no indication in the legislative history that Congress even considered Indian rights when it adopted section 4." Id. This observation lead to this statement by the Court:

The "inconsistent use" provision in section 4, however,
(Footnote Continued)

Finally, the Act of 1950 was enacted merely to authorize the Army and Interior Departments to negotiate a contract with the Tribe for the purchase of project lands. The

(Footnote Continued)

might well be relevant to the issue of whether the Tribe or the state has jurisdiction to regulate hunting and fishing by nonmembers within the Fort Randall and Big Bend taking areas. See New Mexico v. Mescalero Apache Tribe, --- U.S. ---, 103 S. Ct. 2378, 76 L. Ed. 2d 611 (1983); Montana v. United States, 450 U.S. 544, 101 S. Ct. 1245, 67 L. Ed. 2d 493 (1981); White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 100 S. Ct. 2578, 65 L. Ed. 2d 665 (1980). Because we remand this issue to the district court, . . . we need not here determine the relevance of section 4 to the question of jurisdiction over nonmembers of the Tribe.

Id.

One of the issues facing this Court is whether the Tribe has jurisdiction over nonmember hunting and fishing on the taken area. According to Montana, § 4 is relevant only to the extent that it fails to expressly authorize the application of tribal law over nonmembers.

best that can be said of the Act is that it sought to preserve treaty hunting and fishing rights, though South Dakota would disagree with this statement. But, again, treaty-reserved hunting and fishing rights did not expressly delegate tribal regulatory authority over nonmembers on lands within the reservation that were owned by the United States for the general public. The Court can only conclude then that the Act of 1950 fell short of the express congressional delegation of authority required by Montana.

In looking at the preceding discussion, no affirmative action of Congress subjects nonmembers who are hunting or fishing on nonmember fee lands or on the taken area to the civil jurisdiction of the Tribe.

The tribal defendants contend that denying the Tribe jurisdiction over the taken area and fee lands runs afoul of the Lacey

Act, 16 U.S.C. §§ 3371 et seq. Section 3372 provides in relevant part:

(a) It is unlawful for any person --

(1) to import, export, transport, sell, receive, acquire, or purchase any fish or wildlife or plant taken or possessed in violation of any law, treaty, or regulation of the United States or in violation of any Indian tribal law

16 U.S.C. § 3372(a)(1) (1981).

A recent Eighth Circuit opinion concluded that a nonmember's failure to obtain a tribal fishing license and subsequent violation on taken lands was chargeable under the Lacey Act. United States v. Big Eagle, 881 F.2d 539 (8th Cir. 1989), cert. denied, --- U.S. ---, 110 S. Ct. 1145, 107 L. Ed. 2d 1049 (1990), involved a nonmember Indian caught engaging in commercial fishing without a license on the Lower Brule Reservation taken area. Indicted under the Lacey Act, Big Eagle argued that he was not in violation of any Indian tribal law

because the Lower Brule Tribe had no regulatory jurisdiction over him. The Eighth Circuit disagreed, however, stating that "the crucial inquiry is whether the acts complained of took place within the reservation and not, as Big Eagle insists, whether the Lower Brule Tribe itself has the power to prosecute." Id. at 541. The Lacey Act essentially authorizes federal jurisdiction over all reservation lands without regard to the membership status of a defendant or the power of a tribe to enforce its regulations. Id. Thus, Big Eagle decided only that the United States has jurisdiction over all persons on all lands within the reservation and did not resolve any question of the scope of tribal jurisdiction over nonmembers on the taken area. This holding is consistent with the legislative history of the Act. See H.R.

Rep. No. 276, 97th Cong., 1st Sess. 14;
S.Rep.No. 123, 97th Cong., 1st Sess. 5.

The Lower Brule tribal law consisted of a settlement agreement between it and the State which required the purchase of either a state or tribal fishing permit. Big Eagle, 881 F.2d at 541. Because of this settlement agreement, the Appeals Court rejected any attempt to read Big Eagle as intimating its position with regard to future state-tribal jurisdictional conflicts:

Thus, we do not find it necessary to decide the questions left open in Lower Brule. It would be inappropriate to do so in a case where the State of South Dakota is not a party, and where the necessary historical and administrative evidence has not been submitted. See New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 103 S. Ct. 2378, 76 L. Ed. 2d 611 (1983); Montana v. United States, 450 U.S. 544, 101 S. Ct. 1245, 67 L. Ed. 2d 493 (1981).

Id. at 542 n.2.

Nevertheless, the tribal defendants argue that it should have jurisdiction over all persons on the taken and fee lands because the effect of Big Eagle is that tribal licensing requirements ultimately will be enforced -- by either the Tribe or the United States. But this is irrelevant to the State's complaint. The scope of the federal government's prosecutorial powers under the Lacey Act is unrelated to the question whether the Tribe can exclude nonmembers from the taken area or fee lands. A recognition that the United States may choose to enforce tribal regulations against nonmembers on all reservation lands does not force a concession from this Court, that like jurisdiction must therefore exist in the Tribe. See 16 U.S.C. § 3378(c)(3).

B

Congressional delegation of authority is not the exclusive source of tribal civil

jurisdiction over nonmembers on lands within the reservation. The United States Supreme Court pronounced two "exceptions" to Montana's general principle when it wrote:

Though Oliphant only determined inherent tribal authority in criminal matters, the principles on which it relied support the general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe. To be sure, Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservation, even on non-Indian fee lands. A tribe may regulate, through taxation, licensing or other means, the activities of nonmembers who enter into consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements. . . . A tribe may also retain inherent power to exercise civil authority over the conduct on non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe. . . .

Montana, 450 U.S. at 565 (citations omitted).

No "consensual relationship" exists here as nonmember hunters and fishermen on nonmember fee land and the taken area "do not enter any agreements or dealings with the [Cheyenne River] Tribe so as to subject themselves to tribal civil jurisdiction." Id. The Tribe, therefore, may have civil authority over hunting and fishing activities by nonmembers on the taken lands or the nonmember fee lands only if that conduct "imperils" "significant tribal interest."³²

³²This second source of regulatory authority has been called an "exception" to Montana's general rule. See, e.g., Brendale, 109 S. Ct. at 3018 (Justice Blackmun); Note, Undermining Tribal Land Use Regulatory Authority: Brendale v. Confederated Tribes, 13 U. Puget Sound L. Rev. 349, 357 (1990); Note, 21 Ariz. St. L.J. at 777 (cite in note 3). Whether self-government and internal relations create an exception to the implied limitations doctrine, supra, n.3, or are an independent basis for tribal jurisdiction, this alternative source of civil authority flows from the inherent powers retained by (Footnote Continued)

Brendale, 109 S. Ct. at 3008, 3018. This Court has previously stated in its findings of fact, however, that tribal regulation of hunting and fishing by nonmembers on the two

(Footnote Continued)

tribes as dependent sovereigns. Doctrinal developments in Indian law evolved from early American sovereignty jurisprudent which recognized the international law of nations to subject all persons within their borders to laws that further legitimate political, social, and economic interests. See F. Cohen, Handbook of Federal Indian Law 232 (1982 ed.). An anomaly exists, however, in the relations of tribes within the United States which permits them less than the "full attributes of sovereignty." McClanahan v. Arizona Tax Comm'n, 411, U.S. 164, 173, 93 S. Ct. 1257, 36 L. Ed. 2d 129 (1973). The tribes as conquered nations lost their right to determine external relations and retained only the "power of regulating their internal and social relations." Id. Any exercise of power beyond that necessary to territorial management, according to principles of Indian law, must be granted by Congress.

The Ninth Circuit has applied Montana with the most frequency. See, e.g., Confederated Tribes & Bands of Yakima Indian Nation v. Whiteside, 828 F.2d 529, 534 n.1 (9th Cir. 1987), aff'd in part, rev'd in part, 492 U.S. ---, 109 S. Ct. 2994, 106 L. Ed. 2d 343 (1989).

types of land at issue does not pose a threat to the political integrity, the economic security, or the health and welfare of the Cheyenne River Tribe.

The success of the tribal game and fish management program and the protection of tribal hunting and fishing interests does not depend upon the Tribe's ability to regulate nonmember hunting and fishing activities on the two types of land involved in this case. Even though tribal lands contribute to the well-being of wildlife throughout the reservation, such is the nature of game management between states as well. Thus, it is not necessary for the Tribe to regulate nonmembers on the taken area and fee land to effectively manage game populations throughout the reservation. It must be remembered that the Tribe's programs to enhance game and fish populations encompass the entire reservation because it still

retains jurisdiction over its members throughout the reservation. As both the Tribe and the State are ultimately concerned with the effective management of game populations -- the Tribe over its reservation, the State over Dewey and Ziebach counties -- negotiation and compromise still may be required to some extent.

Nonmember conduct on the taken area and fee lands does not jeopardize the efficacy of hunting and fishing by tribal members for subsistence purposes. Subsistence activities of tribal members are not weighed by tribal conservation personnel when establishing season and bag limits. In fact, subsistence hunting and fishing is not monitored by the Tribe at this time.

A paramount tribal interest in the recreational activities of its members on the fee lands and taken area does not exist, except insofar as it generates additional

revenues. Yet loss of revenue from sales of hunting and fishing licenses to nonmembers would not imperil the economic security of the Tribe. The tribal game and fish management program is funded almost entirely through P.L. 638 contracts with the BIA. 25 C.F.R. § 271.32 (1989). The Tribe realizes little revenue from the purchase of fishing licenses by nonmembers. Moreover, the Tribe has failed to develop the Oahe fishery for its own gain despite the fact that, in the past, it has asserted jurisdiction over all persons on the taking area.

Tribal regulation of nonmember hunting and fishing on the taken area is not necessary to protect the Tribe's interest in issuing grazing permits for "sustained yield management and development" and in its tribal members' grazing livestock and other property. Title XV, Cheyenne River Sioux Tribe Grazing Code, p.1 (1988-1993). While

the Tribe cooperates with the BIA in safeguarding its members' grazing permits, grazing livestock and other Indian property can be adequately protected through the United States, the state of South Dakota, or reciprocal tribal agreements. See Duro, 110 S. Ct. at 2065-66 (discussing sources of lawful authority to punish nonmembers). The Tribe and the State adequately monitor the hunting and fishing activities of persons on the taken area to prevent such abuses.

This Court must conclude therefore that the Cheyenne River Tribe has no significant interests bearing on its internal relations which necessitate the assertion of regulatory authority over nonmembers on non-trust lands.

CONCLUSION

The boundaries of the Cheyenne River Reservation as established by the Act of 1889 remain unaltered. And though the Tribe has the treaty power to exercise regulatory

jurisdiction over tribal members throughout the entire reservation. Congress has not expressly delegated to the Tribe hunting and fishing jurisdiction over nonmembers on lands within the exterior boundaries of the reservation which are held in fee by nonmembers or which were taken by the United States for the construction of the Oahe dam and reservoir. Finally, tribal regulatory authority over nonmembers on these lands is not necessary to protect and political integrity, economic security, or health and welfare of the Tribe. Accordingly, the tribal defendants are permanently enjoined from attempting to exclude nonmembers from hunting and fishing on nonmember fee lands or the taken area within the Cheyenne River Reservation, or in any way attempting to regulate such activities.

The Court makes no finding and reaches no conclusion as to the exercise of state

jurisdiction over nonmembers on the fee lands and the taken area, see California v. Cabazon Band of Mission Indians, 480 U.S. 202, 107 S. Ct. 1083, 94 L. Ed. 2d 244 (1987), or as to the reach of tribal civil jurisdiction over nonmembers on trust land, see Merrion v. Jicarilla Apache Tribe, supra. This memorandum opinion constitutes the Court's findings of fact and conclusions of law.

BY THE COURT:

/s/ Donald J. Porter
CHIEF JUDGE

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
CENTRAL DIVISION

DONALD J. PORTER
CHIEF JUDGE
413 U.S. COURTHOUSE
PIERRE, SOUTH DAKOTA 57501

December 5, 1988

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RE: CIVIL NO. 88-3049
STATE OF SOUTH DAKOTA, Plaintiff,
vs.
WAYNE DUCHENEAUX, personally and as
Chairman of the Cheyenne River Sioux
Tribe, and LENITA MINER, personally and
as Director of Cheyenne River Sioux
Tribe Game, Fish and Parks, Defendants.

Dear Counsel:

MEMORANDUM OPINION

On November 10, 1988, the state filed a complaint in the above captioned case to seek injunctive and declaratory relief against defendants Ducheneaux and Miner, two officials of the Cheyenne River Sioux Tribe, to prevent the defendants from enforcing tribal hunting laws upon state-licensed non-Indians hunting deer on non-Indian and Army Corps of Engineers land within the Cheyenne River Indian Reservation. Fearful of confrontation between armed non-Indian deer hunters and tribal game wardens, this Court on November 10 issued a temporary restraining order, which subsequently was extended until and including November 28, 1988. The deer season for those hunting with rifles in western South Dakota expired on November 27, 1988.

On November 22, 1988, this Court heard oral arguments on whether to dissolve the

temporary restraining order or to issue a preliminary injunction. The state on that same day filed an amended complaint extending the complaint and prayer to include all hunting and fishing, instead of just deer hunting. Understandably, defendants were unprepared at the November 22 hearing to present facts regarding fishing and hunting animals other than deer. This Court therefore decided against modifying the temporary restraining order or issuing other injunctive relief, and instead held evidentiary hearings on November 28 and 29, 1988 to evaluate several difficult factual questions relating to injunctive relief.

The defendants assert that they have authority to regulate all hunting and fishing on both fee land and on the "taking area." The taking area is a gerrymandered strip of land adjacent to the Missouri River and Lake Oahe on the eastern end of the Cheyenne River

Indian Reservation. The Army Corps of Engineers owns the land, which was taken from private owners in 1954 for development of the Missouri River and Lake Oahe. Much of the taking area is fenced as parts of range units maintained by Indian ranchers who have grazing rights on the taking area. It is nearly impossible without a map to know the boundaries of the taking area since the land is not generally fenced or otherwise demarcated from trust or fee land. In many cases, hunters³³ pass through Indian land to access the taking area.

At the November 28 hearing, defendants agreed to refrain from enforcing tribal

³³This memorandum opinion concentrates on hunting since the bulk of the testimony in this case has focused on hunting. Everything said in this opinion regarding hunting and hunters is meant to include fishing and fishermen.

hunting laws on fee lands held by non-Indians. The defendants do not concede that they lack authority over these lands, but merely have chosen not to object at this time to the entry of a preliminary injunction regarding non-Indian fee lands. Defendants have further agreed to provide two weeks notice if they desire to change their position. Therefore, the only issue presently before this Court is whether to grant a preliminary injunction to prevent the defendants from enforcing tribal game laws on the taking area.

II. DISCUSSION

A. Standard for Issuing a Preliminary Injunction

Rule 65 of the Federal Rules of Civil Procedure authorizes this Court to issue a preliminary injunction. To determine whether to grant a preliminary injunction, this Court must consider four factors: 1) threat of

irreparable harm to the movant; 2) balance between this harm and the injury that granting the injunction will inflict on other litigants; 3) probability that movant will succeed on the merits; and 4) public interest. Dataphase Systems, Inc. v. C L Systems, Inc., 640 F.2d 109, 113 (8th Cir. 1981).

A movant must show a threat of irreparable harm or the motion for a preliminary injunction will be denied. Gelco Corp. v. Coniston Partners, 811 F.2d 414, 418 (8th Cir. 1987); Harris v. United States, 745 F.2d 535, 536 (8th Cir. 1984); Roberts v. Van Buren Public Schools, 731 F.2d 523, 526 (8th Cir. 1984). Because the state has failed to make a sufficient showing of irreparable injury, this Court refuses to issue a preliminary injunction with regard to the taking area.

B. Threat of Irreparable Harm to the State

The state contends that absent injunctive relief, it is threatened by three types of irreparable injury: 1) confrontation involving state-licensed hunters and tribal game wardens; 2) decreased value and marketability of the state licenses; and 3) disruption of the state's wildlife management program.

1. Confrontation

Any enforcement of hunting laws involves a certain amount of "confrontation". This Court, however, must decide whether the confrontation resulting from attempts by tribal officials to enforce tribal game laws on state-licensed non-Indian hunters poses a threat of irreparable injury sufficient to merit injunctive relief. There are two ways in which confrontation may pose a threat of irreparable injury: 1) resistance by state-licensed non-Indian hunters to the

authority of the tribal wardens possibly resulting in armed hostilities; and 2) tribal overreaching in law enforcement.

Hostile Resistance

Ron Catlin, the law enforcement staff specialist for the state's Game, Fish and Parks Department, and Don McCrea, the state's wildlife conservation officer for Ziebach County, both testified that physical confrontations between state game wardens and violators of game laws are quite rare. N. Dennis Rousseau, a game warden for the Cheyenne River Sioux Tribe's Game, Fish and Parks Department, similarly reported that he had never experienced serious resistance to his enforcement of tribal laws. Though the state game officials appear to be much better trained and educated in game management, the tribal wardens receive instruction on how to approach hunters and enforce the law. Tribal game wardens have confronted non-Indian

hunters presumed to be in violation of tribal hunting law on three occasions. Each situation was resolved peaceably. Historically, tribal game wardens have sought to avoid confrontation although by allowing non-Indians improperly hunting without a tribal license to buy the \$8 sticker rather than aggressively pursuing civil charges or confiscating property. Therefore, the evidence suggests that tribal wardens will not encounter hostile resistance to tribal authority from a state-licensed hunter on the taking land.

In addition, enforcement of tribal hunting laws on the taking area does not pose as much a threat of "confrontation" as would tribal enforcement on non-Indian lands. The taking land has a distinct Indian flavor since it is owned by the federal government and largely controlled by Indians through grazing agreements. In contrast, a

state-licensed hunter on non-Indian fee land would be more likely to resist tribal authority since the land is generally not under Indian control and may indeed be owned by the hunter or the hunter's non-Indian friend.

Tribal Overreaching

A possible second threat of confrontation is tribal overreaching of its enforcement authority. Conceivably, the state would be irreparably injured if the defendants were to enforce tribal laws in such a manner as to exceed the limited tribal authority over non-Indians or deny non-Indians constitutional rights. See Greywater v. Joshua, 846 F.2d 486, 492 (8th Cir. 1988) (limited tribal authority over non-Indians); National Ass'n of Psychiatric Treatment Centers v. Weinberger, 661 F. Supp. 76, 81 (D.Colo. 1986) (impact of challenged actions on other interested parties besides

the litigants is relevant to evaluating injury); Walker v. Wegner, 477 F. Supp. 648, 653 (D.S.D. 1979), aff'd, 624 F.2d 60 (abridgement of first amendment freedoms is an irreparable injury). Historically, tribal enforcement of its hunting laws against non-Indians has been far from aggressive unreasonableness. In two instances, the tribe has sought to enforce its hunting laws arguably beyond its authority.³⁴ In both

³⁴ In 1987, tribal game warden N. Dennis Rousseau stopped a non-Indian named Michael Keys on the taking area for improperly-hunting deer. After checking with state and federal officials, Rousseau was told that the tribe lacked jurisdiction, so no action was pursued against Keys.

In another instance, several deer hunters were stopped by a tribal game warden for hunting deer on non-Indian fee land without a tribal license. The hunters simply purchased licenses from the tribe at that time. After the tribe learned that under present law no tribal license was required of non-Indians hunting on non-Indian lands, the tribe allowed the hunters to return to the
(Footnote Continued)

instances, tribal officials cooperatively rectified the situations. The tribe has not criminally prosecuted or imposed severe or unfair penalties on non-Indian hunters.

The state emphasized throughout the hearings that the tribe's original announcement before the deer hunting season about enforcement of tribal game laws mentioned that the tribe would prosecute all violators of its game laws. The state also stressed that defendant Ducheneaux has reaffirmed that the tribe would enforce its hunting laws against non-Indians if allowed to do so. Given the history of tribal

(Footnote Continued)

reservation after deer season had ended and to hunt deer on Indian lands. Whether the tribe indeed lacked authority in these two instances is the question that this Court must resolve when the case is submitted on the merits. What is noteworthy now is that the tribe did not act unreasonably and was quick to correct perceived mistakes.

enforcement, this Court believes that defendants and the tribe's three game wardens will not pursue aggressive, overreaching enforcement of tribal game codes against non-Indians on the taking area. If the defendants' enforcement of hunting laws on the taking area trammels non-Indian rights, this Court would entertain a motion to modify the preliminary injunction. Presently, the threat of confrontation is far too speculative to qualify as a threat or irreparable injury. See Salant Acquisition Corp. v. Manhattan Industries, Inc., 682 F.Supp. 199, 202 (S.D.N.Y. 1988) (threat of irreparable injury must be actual or imminent, not remote or speculative).

2. Effect on License Value and Marketability

The state argues that if the tribe has the ability to regulate and perhaps severely restrict non-Indian hunting, the value and

sales of the state licenses will drop as non-Indian hunters will become increasingly reluctant to hunt on the reservation. Courts usually are reluctant to grant a preliminary injunction when the alleged injury is merely pecuniary in nature. See, e.g., Regents of University of California v. American Broadcasting Companies, Inc., 747 F.2d 511, 519 (9th Cir. 1984); Perpetual Bldg. Ltd. Partnership v. District of Columbia, 618 F. Supp. 603, 615 (D.D.C. 1985). Monetary loss frequently is not an irreparable injury since money damages caused by another's unlawful activities usually are recoverable and thus remediable. Morton v. Beyer, 822 F.2d 364, 372 (3d Cir. 1987); Dos Santos v. Columbus-Cuneo-Cabrini Medical Center, 684 F.2d 1346, 1349 (7th Cir. 1982). The entry of a preliminary injunction regarding fee land safeguards the value of the state license with respect to non-Indian hunting on

private non-Indian land. The refusal to extend the preliminary injunction to the taking area will not appreciably affect the value and sales of state licenses for several reasons. First, the taking area is a relatively small part of the reservation; few people apparently buy state licenses to hunt exclusively on the taking area. Second, there is no indication that the tribe will enforce its law on the taking area to discourage non-Indians from hunting there altogether. Moreover, if this Court ultimately determines that the tribal defendants lack authority over the taking area, the state may be able to recover damages to the value of state licenses incurred as a result of tribal enforcement of its hunting laws in the taking area. See Danden Petroleum, Inc. v. Northern Natural Gas Co., 615 F. Supp. 1093, 1099 (N. Tex. 1985) (injury is irreparable only if it

cannot be undone through monetary relief). Therefore, shared regulation of hunting on the taking land during the pendency of this case does not pose a threat or irreparable injury to the value and marketability of state licenses.

3. Game Management

The State engages in detailed game management throughout the Cheyenne River Indian Reservation by stocking fish, safeguarding habitats and monitoring wildlife. The tribe meanwhile does very little game management. The state contends that failure to preliminarily enjoin the tribal officers from enforcing their game laws would disrupt state management of game in Dewey and Zeibach counties.

The state's argument has merit in that tribal control of hunting throughout the reservation could frustrate the state programs for carefully controlled and

preserved game population and habitat. However, according to the testimony of Wesley Rice, the senior biologist of the state Game, Fish & Parks Department, the state is able to effectively manage wildlife on the reservation despite exclusively controlling hunting on only half of the land.³⁵ Since the state can effectively manage game without 100% exclusive control of reservation hunting, allowing shared regulation of the relatively small strip of land called the taking area will not irreparably injure state game management. Moreover, the tribe does not seek to disrupt state game management policies. Indeed, notwithstanding this litigation, the state conservation officers

³⁵The preliminary injunction preserves the state's exclusive control of hunting by non-Indians on non-Indian lands. Approximately half of the reservation land is non-Indian fee land.

and tribal game wardens appear to enjoy an amicable relationship.

C. Conclusion

The state has not met its burden of showing a threat of irreparable injury if the defendants are allowed to enforce their hunting laws on the taking area. The conclusion is based on a review of the situation as it presently exists. If tribal hunting laws are enforced in a manner detrimental to the state, this Court may reconsider this decision. This ruling on the preliminary injunction does not imply a view on the merits or on whether the tribe could successfully challenge a preliminary injunction concerning non-Indian fee land. This ruling similarly is not meant to discourage state enforcement of state hunting laws on the taking land.

BY THE COURT:

DONALD J. PORTER

CHIEF JUDGE

Filed November 10, 1988
 William F. Clayton
 Clerk

UNITED STATES DISTRICT COURT
 DISTRICT OF SOUTH DAKOTA
 CENTRAL DIVISION

 STATE OF SOUTH DAKOTA,

Plaintiff

TEMPORARY RESTRAINING
 ORDER

vs.

CIVIL NO. 88-3049

WAYNE DUCHENEAUX,
 Personally and as
 Chairman of the Cheyenne
 River Sioux Tribe and
 as LENITA MINER,
 personally and as
 Director of the
 Cheyenne River Sioux
 Tribe Game, Fish and
 Parks,

Defendants.

The Court has examined the pleadings, documents and affidavits submitted by the plaintiff State of South Dakota. It appears that the defendants Wayne Ducheneaux and Lenita Miner intend to restrain non-Indians from hunting on fee land and public land

within the Cheyenne River Indian Reservation. It further appears that the defendants are about to attempt to subject non-Indians to the criminal jurisdiction of tribal courts.

This Court is satisfied that the plaintiff State of South Dakota will be irreparably injured if the defendants are allowed to take these actions. The State has licensed 353 deer hunters to hunt on non-Indian lands in Dewey and Ziebach Counties on the Cheyenne River Indian Reservation. The game wardens of the Cheyenne River Indian Reservation who will be attempting to prevent all hunters not licensed by the Tribe from hunting on the Reservation will be carrying guns. In this situation, the likelihood of armed confrontation is high.

This Court is also satisfied that no irreparable harm will result to the Tribe. It appears that the allowance of

state-licensed hunting on non-Tribal lands is the status quo. This temporary restraining order is intended to preserve the status quo until rights to regulate hunting on the Reservation can be fully adjudicated.

This Court notes that there is a substantial likelihood of the State succeeding on the merits. Under Montana v. United States, 450 U.S. 544 (1981), tribal rights to regulate non-Indian hunting on non-Indian lands within a reservation are limited. Similarly, under Gregwater v. Joshua, 846 F.2d 486 (8th Cir. 1988) and under Article V, § 1(c) of the Bylaws of the Cheyenne River Sioux Tribe of South Dakota, the tribe appears to lack jurisdiction over non-Indian hunters it apprehends without the consent of the non-Indian.

Finally, this Court perceives no reason why a temporary restraining order would contravene the interests of justice. Rights

to regulate hunters on non-Indian lands within the reservation should be decided in due course before this Court, rather than by threats days before deer hunting season begins. Therefore, it is

ORDERED that defendants and all others in concert with them who have actual notice of this order shall cease any attempt to restrain non-Indians possessing state hunting licenses from hunting on non-Indian or public lands within the Cheyenne River Sioux Indian Reservation. It is further

ORDERED that defendants and all others in concert with them who have actual knowledge of this order shall cease any attempt to subject non-Indians to arrest or prosecution in tribal courts unless in accordance with Article V, § 1(c) of the Bylaws of the Cheyenne River Sioux Tribe of South Dakota.

Dated November 10, 1988.

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BY THE COURT:

DONALD J. PORTER
CHIEF JUDGE

ATTEST:

WILLIAM F. CLAYTON, CLERK

By: VICKY J. REINHARD
Deputy

(SEAL OF COURT)

A-185

Flood Control Act of 1944, Pub.L. 534, 58 Stat. 889 (1944), Section 4.

Sec. 4. The Chief of Engineers, under the supervision of the Secretary of War, is authorized to construct, maintain, and operate public park and recreational facilities in reservoir areas under the control of the War Department, and to permit the construction, maintenance, and operation of such facilities. The Secretary of War is authorized to grant leases of lands, including structure or facilities thereon, in reservoir areas for such periods and upon such terms as he may deem reasonable: Provided, that preference shall be given to Federal, State, or local governmental agencies, and licenses may be granted without monetary consideration, to such agencies for the use of areas suitable for public park and recreational purposes, when the Secretary of War determines such action to be in the

public interest. The water areas of all such reservoirs shall be open to public use generally, without charge, for boating, swimming, bathing, fishing, and other recreational purposes, and ready access to and exit from such water areas along the shores of such reservoirs shall be maintained for general public use, when such use is determined by the Secretary of War not to be contrary to the public interest, all under such rules and regulations as the Secretary of War may deem necessary. No use of any area to which this section applies shall be permitted which is inconsistent with the laws for the protection of fish and game of the State in which such area is situated. All moneys received for leases or privileges shall be deposited in the Treasury of the United States as miscellaneous receipts.

Pub. L. No. 870, 64 Stat. 1093 (1950)

AN ACT

To authorize the negotiation and ratification of separate settlement contracts with the Sioux Indians of Cheyenne River Reservation in South Dakota and of Standing Rock Reservation in South Dakota and North Dakota for Indian lands and rights acquired by the United States for the Oahe Dam and Reservoir, Missouri River development, and for other related purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Chief of Engineers, Department of the Army, jointly with the Secretary of the Interior, representing the United States of America, are hereby authorized and directed to negotiate contracts containing the provisions outlined herein separately with the Sioux Indians of the Cheyenne River Reservation in

South Dakota and with the Sioux Indians of the Standing Rock Reservation in South Dakota and North Dakota, through representatives of the two tribes appointed for this purpose by their tribal councils.

Sec. 2. The contracts made pursuant to section 1 of this Act shall--

(a) convey to the United States the title to all tribal, allotted, assigned, and inherited lands or interests therein belonging to the Indians of each tribe required by the United States for the reservoir to be created by the construction of the dam across the Missouri River in South Dakota, to be known as Oahe Dam, including such lands along the margin of said reservoir as may be required by the Chief of Engineers, United States Army, for the protection, development, and use of said reservoir: Provided, That the date on

which the contract is signed by Chief of Engineers, United States Army, and the Secretary of the Interior shall be the date of taking by the United States for purposes of determining the ownership of the Indian tribal, allotted, and assigned lands conveyed thereby to the United States, subject to the determinations and the payments to be made as hereinafter provided for:

(b) provide for the payment of--

(1) just compensation for lands and improvements and interests therein, conveyed pursuant to subsection (a);

(2) costs of relocating and reestablishing the tribe and the members of each tribe who reside upon such lands so that their economic, social, religious, and community life can be reestablished

and protected: Provided, That such costs of relocating and reestablishing the tribe and the members of each tribe who reside upon such lands shall not result in double compensation for lands and properties to the tribe and members of each tribe; and

(3) costs of relocating and reestablishing Indian cemeteries, tribal monuments, and shrines located upon such lands;

(c) provide that just compensation for the lands of individual members such tribes, who reject the appraisal covering their individual property, shall be judicially determined in proceedings instituted for such purpose by the Department of the Army in the United States district court for the

district in which the lands are situated;

(d) provide a schedule of dates for the orderly removal of the Indians and their personal property situated within the taking area of the Oahe Reservoir within the respective reservations: Provided, That the Chief of Engineers shall have primary and final responsibility in negotiating concerning the matters set out in the foregoing paragraphs (a) and (b) hereof;

(e) provide for the final and complete settlement of all claims by the Indians and tribes described in section 1 of this Act against the United States arising because of construction of the Oahe project.

Sec. 3. To assist the negotiators in arriving at the amount of just compensation as provided herein in section 2 (b) (1), the

Secretary of the Interior or his duly authorized representative and the Chief of Engineers, Department of the Army, or his duly authorized representative shall cause to be prepared an appraisal schedule on an individual tract basis of the tribal, allotted, and assigned lands, including heirship interests therein, located within the taking areas of the respective reservations. In the preparation thereof, they shall determine the fair market value of the lands, giving full and proper weight to the following elements of appraisal: Improvements, severance damage, standing timber, mineral rights, and the uses to which the lands are reasonably adapted. They shall transmit the schedules to the representatives of the tribes appointed to negotiate a contract, which schedules shall be used as a basis for determining the amount of just compensation to be included in the contracts

for the elements of damages set out in section 2 hereof.

Sec. 4. The specification in sections 2 and 3 hereof of certain provisions to be included in each contract shall not operate to preclude the inclusion in such contracts of other provisions beneficial to the Indians who are parties to such contracts.

Sec. 5. (a) The contracts negotiated and approved pursuant to this Act shall be submitted to the Congress within eighteen months from and after the date of enactment of this Act.

(b) No such contract shall take effect until it shall have been ratified by Act of Congress and ratified in writing by three-quarters of the adult members of the two respective tribes designated in section 1 hereof, separately, within nine months from the date of the Act ratifying each said contract: Provided, That in the event the

negotiating parties designated by section 1 of this Act are unable to agree on any item or provision in the proposed contracts, said items or provisions shall be reported separately to the Congress as an appendix to each contract, and shall set out the provisions in dispute as proposed by the advocates thereof for consideration and determination by the Congress.

Sec. 6. Nothing in this Act shall be construed to restrict the orderly prosecution of the construction or delay the completion of the Oahe Dam to provide protection from floods on the Missouri River.

Approved September 30, 1950.

Pub. L. No. 776, 68 Stat. 1191 (1954).

AN ACT

To provide for the acquisition of lands by the United States required for the reservoir created by the construction of Oahe Dam on the Missouri River and for rehabilitation of the Indians of the Cheyenne River Sioux Reservation, South Dakota, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this agreement between the United States of America and the Sioux Indians of Cheyenne River Reservation in South Dakota, Witnesseth, That this agreement when enacted by Congress and when confirmed and accepted in writing by three-quarters of the adult Indians of the Cheyenne River Reservation in South Dakota, as shown by the tribal rolls of

the said reservation, does hereby convey to the United States all tribal, allotted, assigned, and inherited lands or interests within said Cheyenne River Reservation belonging to the Indians of said reservation, which lands are required by the United States for the reservoir to be created by the construction of the dam across the Missouri River in South Dakota, now known as Oahe Dam, including such lands along the margin of said proposed reservoir as may be required by the Chief of Engineers, United States Army, for the construction, protection, development, and use of said reservoir all as described in part II of this agreement, subject, however, to the conditions of this agreement hereinafter set forth: Provided, That the effective date of this Act shall be the date when the Secretary of the Interior shall by proclamation declare that this agreement has been ratified and approved in writing by

three-quarters of the adult members of said Indians as above defined.

SECTION II. The United States agrees to pay, out of funds appropriated for construction of the Oahe project, as just compensation for all lands and improvements and interests therein (except the agency hospital) conveyed pursuant to section I of this Act; and for the bed of the Missouri River so far as it is the eastern boundary of said Cheyenne River Reservation, the sum of \$5,384,014; which sum shall be in final and complete settlement of all claims, rights, and demands of said Tribe or allottees or heirs thereof arising out of the construction of the Oahe project, and shall be deposited to the credit of said Tribe in the Treasury of the United States, to draw interest on the principal thereof at the rate of 4 per centum per annum until expended: Provided, That the said Tribal Council with the approval of the

Secretary of the Interior shall distribute the sum of \$2,250,000 in accordance with the revised appraisal of the Missouri River Basin investigation staff of the Department of the Interior.

SECTION III. The United States further agrees to appropriate, and the Secretary of the Army is authorized and directed to make available from sums so appropriated to be charged against the cost of construction of the Oahe project, further additional appropriations for the special purposes of relocating and reestablishing the Indian cemeteries, tribal monuments and shrines within the taking area for said reservoir described in Part II of this Act as the Tribal Council of said Indian Tribe shall select and designate, which sums shall be expended on the recommendation of the Tribal Council with the approval of the Secretary of Interior.

SECTION IV. The United States further agrees to appropriate, and the Secretary of the Army is authorized and directed to make available from sums so appropriated to be charged against the cost of construction of the Oahe project, further additional appropriations which shall be expended for the relocation and reconstruction of Cheyenne River Agency, relocation and reconstruction of schools, hospitals, service buildings, agents and employees quarters, roads, bridges and incidental matters or facilities in connection therewith.

SECTION V. In addition to the sum set out in section II hereof, the United States further agrees that it will appropriate and make available a further sum in the total amount of \$5,160,000 which shall likewise be deposited in the Treasury of the United States to the credit of said Indian Tribe to draw interest on the principal thereof at the

rate of 4 per centum per annum until expended for the purpose of complete rehabilitation for all members of said Tribe who are residents of the Cheyenne River Sioux Reservation at the time of the passage of this Act, whether or not residing within the taking area of the Oahe Project, and for relocating and reestablishing members of said Tribe who reside upon such lands conveyed to the United States to the extent that the economic, social, religious, and community life of all said Indians shall be restored to a condition not less advantageous to said Indians than the condition that the said Indians now are in: Provided, That said fund provided for in this section shall be expended upon the order and direction of the Tribal Council of said Tribe, with the approval of the Secretary of the Interior, for the purposes set forth in this section: Provided further, That the authorization

contained in section XVI hereof shall remain available for a period not to exceed ten years from the effective date of this Act.

SECTION VI. The United States agrees that all mineral rights of whatsoever nature at or below the surface within the taking area as described in Part II hereof shall be and hereby are reserved to said Indian Tribe or individual owners or holders of lands or interests in lands as their interests may appear under section I hereof, subject to future extraction and use by said Tribe or said members thereof or their heirs, successors, or assigns, but also subject to all reasonable regulations which may be imposed by the Chief of Engineers, United States Army, for the protection and use by the United States of the taking area for the purposes of the Oahe Dam and Reservoir Project.

SECTION VII. The members of said Indian Tribe shall have the right without charge to cut and remove all timber and to salvage any portion of the improvements within said taking area either by demolition or removal, and the owners of the land whereon said improvements stand shall have a prior right to such salvage but if said right is waived or not exercised before the date of the notice provided for in section IX hereof, the Tribal Council shall have the right to designate others to demolish or remove said timber and improvements or in the discretion of the Tribal Council, said demolition or removal may be undertaken and carried out by said Tribal Council: Provided, That the salvage permitted by this section shall not be construed as "double compensation" as set out in section 2(b)(2) of Public Law 870, Eighty-first Congress.

SECTION VIII. The United States and the Indian parties to this agreement recognize that a hazard to livestock is created by the rise and fall of the waters to be impounded in Oahe Reservoir. They also recognize that said hazard is not subject to exact determination at this time, therefore the parties to this agreement agree that all hazards which may develop when the annual rise and fall of Oahe Reservoir can reasonably be determined shall be met by the United States by such protective measures as may be necessary to minimize losses to the Indian parties hereto as to livestock only.

SECTION IX. Members of said Indian Tribe now residing within the taking area of the project shall have the right without charge to remain on and use the lands hereby conveyed as said lands are now being used from and after the effective date of this Act to the point in time where the gates of Oahe

Dam are to be closed for the impoundment of the water of the Missouri River. The Chief of Engineers shall give public notice one year in advance of the prospective date of the closing of said gates for said purpose and all improvements of whatever nature, all timber of whatever kind or class shall be salvaged or removed or else shall be considered as abandoned by the Tribe or by the individual owners at a date six months subsequent to the date of the notice given by the Chief of Engineers. All individuals and personal property shall remove or be removed from the taking area before the expiration of the one year's notice given by the Chief of Engineers as aforesaid. And the United States shall not be liable for any loss of life or property not so removed from the taking area from and after the expiration of said notice.

SECTION X. After the Oahe Dam gates are closed and the waters of the Missouri River impounded, the said Indian Tribe and the members thereof shall have the right to graze stock on the land between the level of the reservoir and the taking line described in Part II hereof. The said Tribal Council and the members of said Indian Tribe shall have, without cost, the right of free access to the shoreline of the reservoir including the right to hunt and fish in and on the aforesaid shoreline and reservoir, subject, however, to regulations governing the corresponding use by other citizens of the United States.

SECTION XI. The United States through the Department of Interior shall render all aid and assistance to individual members of said Tribe whose lands are within the said taking area for the purposes of purchasing land in the name of the United States for

said individuals and the United States shall reconvey said lands under trust patent to the individual owners upon the selection by said owners of the land which they decide to have purchased for them. The said trust patents shall be in form and effect the same as corresponding trust patents heretofore issued to said individuals. The holders of exchange assignments within the said taking area shall be regarded as holders of trust patents and shall be accorded the same privileges and procedures as holders of land held in trust as in this section provided.

The funds for the purchase of such substitute land in all cases shall be provided by the individual apply for such purchase and reconveyance as is herein described, out of monies placed to his credit for the transfer of his lands, improvements and timber under the authority of this agreement and the subsequent Act of Congress

herein provided for but no service charge shall be made by the United States in addition to the cost of the substitute allotment. The lands so selected and purchased as substitute allotments may be either within the boundaries of the Cheyenne River Reservation as diminished by this agreement or outside said reservation as may meet the desires of the individuals involved in the several transactions: Provided, That no purchase of lands outside the Cheyenne River Reservation shall affect the existing status of such lands, interests or rights therein, or improvements thereon, with respect to taxation. No prior Act of Congress or Departmental regulation shall be held to be a bar to the full operation of this section, nor shall the Tribal Constitution, ordinance or resolution thereunder be held to be a bar to the full operation of this section, numbered XI.

SECTION XII. No part of any expenditure made by the United States under any or all of the provisions of this agreement and the subsequent acts of ratification shall be charged as an offset or counter claim against any tribal claim which has arisen under any treaty, law, or executive order of the United States prior to the effective date of taking of said land as provided for in section I hereof and the payment of Sioux benefits as provided for in section 17 of the said Act of March 2, 1889 (25 Stat. 888), as amended, shall be continued under the provision of section 14 of the Indian Reorganization Act of June 18, 1934 (48 Stat. 984), on the basis now in operation without regard to the loss of tribal land within the taking area under the provisions of this agreement.

SECTION XIII. The United States agrees to reimburse the said Tribal Council for expenses incurred by it and caused by, or

incident to, the negotiations which have led up to the making and ratification of this agreement: Provided, That such reimbursable expenses do not exceed in the aggregate \$100,000, of which not more than \$50,000 shall be payable as attorney fees. The Tribal Council shall send a statement to the Secretary of the Army setting out said expenses up to the date of the proclamation to be issued by the Secretary of the Interior declaring that the Act of Congress approving this agreement is in full force and effect. The Secretary of the Army shall forward said statement to the Congress for appropriation together with his recommendations.

SECTION XIV. Holders of inherited lands or interests in lands may consolidate their interests by and between themselves and the total proceeds in the hands of any individual held by such consolidation of interests may be used by any individual holder of the same

for purchase of substitute lands as in section XI provided.

SECTION XV. The right of any individual member of said Indian Tribe to reject the final appraisal made on his land and improvements shall be preserved and, if any individual does reject such final appraisal, he shall file notice of such rejection by notice in writing to the Chief of Engineers, United States Army, who shall thereupon file a proceeding in the United States District Court of the District of South Dakota as in a condemnation proceeding and jurisdiction is hereby conferred upon said Court to determine, by procedure corresponding to a condemnation proceeding, the value of said land and improvements and the said Tribal Council shall deposit with the clerk of said court the full amount set out in the final appraisal which was previously offered to said individual, which fund shall be used in

payment in full or in part of the final judgment of said United States District Court. Cost of such proceedings shall be borne by the United States and the individual involved shall be entitled to counsel at his own expense. In the event the amount of the appraisal so deposited in said Court is not enough to cover the final judgment in said proceeding, the United States shall pay such difference from the fund of \$5,384,014 established under section II, hereof, into the hands of the clerk of said Court and thereupon title shall vest in the United States.

SECTION XVI. There is hereby authorized to be appropriated not to exceed \$10,644,014, as provided by sections II, V, and XIII, exclusive of the sums to be charged against the cost of construction of the Oahe project as provided in sections III and IV hereof.

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PART II

The lands conveyed by this agreement are the following tracts of land all in the State of South Dakota:

Township 5 north, range 30 east,
Black Hills meridian

Section 5: Northwest quarter northwest quarter northeast quarter; north half northwest quarter; north half southeast quarter northwest quarter; northwest quarter southwest quarter northwest quarter.

Section 6: Northeast quarter northeast quarter; northeast quarter southeast quarter northeast quarter; north half northwest quarter northeast quarter; east half northeast quarter northwest quarter.

Township 6 north, range 29 east,
Black Hills meridian

Section 1: Lots 1, 2, 5, and 6.

Township 6 north, range 30 east,
Black Hills meridian

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Section 28: Southwest quarter southeast quarter.

Section 33: Northeast quarter northwest quarter northeast quarter; southeast quarter northwest quarter.

Township 7 north, range 29 east,
Black Hills meridian

Section 21: All.

Section 34: Southeast quarter.

Township 7 north, range 30 east,
Black Hills meridian

Section 19: Lots 1, 2, and 3.

Section 20: Lot 1.

Section 29: Lots 1, 2, and 3.

Section 30: Northeast quarter northeast quarter; each half southeast quarter northeast quarter; north half northwest quarter northeast quarter; north half northeast quarter northwest quarter.

Section 31: West half northeast quarter; lots 6, 7, and 8.

Section 32: Lot 1.

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Township 8 north, range 23 east,
Black Hills meridian

Section 1: Lots 5 and 6.

Township 9 north, range 23 east,
Black Hills meridian

Section 36: South half southwest
quarter and lots 2, 3, and 4.

Township 9 north, range 24 east,
Black Hills meridian

Section 12: South half south half
northeast quarter; northwest quarter
southeast quarter; southeast quarter
northeast quarter southwest quarter; east
half southwest quarter southwest quarter;
lots 2, 3, 4, and 5.

Section 13: West half northwest
quarter; northwest quarter southwest quarter;
lots 6, 7, 8, and 9.

Section 14: South half; south half
northwest quarter; west half southwest
quarter northeast quarter; east half
southeast quarter northeast quarter.

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Section 15: Southeast quarter northeast
quarter; south half southeast quarter
southeast quarter.

Section 22: North half northeast
quarter northeast quarter; northeast quarter
southeast quarter; southeast quarter
northwest quarter southeast quarter; lots 2
and 3; lot 1 except ten acres in the form of
a square situated in the northwest corner
thereof.

Section 23: Northwest quarter;
northwest quarter northeast quarter; lots 6,
7, 8, and 9.

Section 27: Lots 5, 6, 8, 9, and 10;
lot 7, except ten acres in the form of a
square, situated in the northwest corner
thereof.

Section 28: South half southeast
quarter; south half north half southeast
quarter.

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Section 31: Southeast quarter northeast quarter; lots 6, 7, 8, and 9.

Section 32: South half south half northwest quarter; lots 8 and 9.

Section 33: Lots 5 and 6.

Section 34: Northwest quarter southeast quarter northwest quarter; lots 1, 2, and 3.

[The remainder of the land descriptions are omitted.]

A-217

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

CENTRAL DIVISION

DONALD J. PORTER
CHIEF JUDGE
413 U.S. COURTHOUSE
PIERRE, SOUTH DAKOTA 57501

July 3, 1989

Roger A. Tellinghuisen, Attorney General
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Pierre, South Dakota 57501-5090
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RE: CIVIL NO. 88-3049
STATE OF SOUTH DAKOTA, Plaintiff
vs.
WAYNE DUCHENEAUX, personally and as
Chairman of the Cheyenne River Sioux
Tribe, and LENITA MINER, Personally and
as Director of Cheyenne River Sioux
Tribe Game, Fish and Parks, Defendants.

Dear Counsel:

MEMORANDUM OPINION

On November 10, 1988, plaintiff State of South Dakota (the State) filed the above captioned case naming as defendants Wayne Ducheneaux, chairman of the Cheyenne River Sioux Tribe (the Tribe), and Leneta Miner, director of the Tribe's game, fish and parks program. The amended complaint seeks injunctive relief and a declaratory judgment concerning the authority of defendants and the Tribe to regulate non-Indian hunting on the Cheyenne River Indian Reservation. In particular, the action focuses on tribal authority over non-Indian hunters both on non-Indian fee land within the reservation and on a strip of land adjacent to Lake Oahe called the "taking area."

Upon the request of the State, this Court issued and later extended a temporary restraining order to prevent possible armed confrontation between state-licensed

non-Indian deer hunters and tribal game wardens. On November 28 and 29, 1988, the parties presented to this Court live testimony and oral arguments on whether preliminary injunctive relief was merited. In an opinion filed on December 6, 1988, this Court declined to issue a preliminary injunction restraining the tribal defendants from enforcing its hunting laws on the taking area. Since the defendants decided not to contest the State's request for a preliminary injunction concerning fee lands, this Court issued a preliminary injunction to enjoin enforcement of tribal hunting laws upon non-Indians on non-Indian fee lands within the reservation. South Dakota v. Ducheneaux, No. 88-3049, slip op. (D.S.D. December 5, 1988), reprinted in, 16 Indian L. Rep. 3012.

On March 27, 1989, defendants filed a motion to dismiss which raises three issues: 1) whether the portion of the complaint

alleging that defendants have threatened criminal sanctions against non-Indians should be dismissed because the allegation does not present a case of controversy: 2) whether the United States is an indispensable party under Rule 19 of the Federal Rules of Civil Procedure such that the suit may not proceed without the participation of the United States: and 3) whether the case can proceed despite the sovereign immunity of the Cheyenne River Sioux Tribe and the absence of the Tribe from the suit. This Court answers each of these questions in the negative at this time and thus denies defendants' motion to dismiss.

I. Case or Controversy Issue

Part of what triggered this case was a statement issued by defendant Ducheneaux a few days before the beginning of deer hunting season on the reservation. The statement read:

Due to the state of South Dakota's intransigence, all hunters must now hold a Cheyenne River Sioux tribal hunting license to hunt on any and all lands within the exterior boundaries of the reservation. The state licenses will no longer be honored and violators are subject to prosecution in tribal court.

The State interprets the use of the word "prosecution" as threatening criminal sanctions against non-Indians and asserts that the Tribe lacks criminal jurisdiction over non-Indians under Oliphant v. Suquamish Tribe, 435 U.S. 191 (1978). The defendants, however, disavow any desire to hold non-Indians criminally accountable and instead contend that "prosecution" refers only to civil forfeiture sanctions. Indeed, defendant Ducheneaux testified during the hearing held on November 28 and 29, 1988 that the statement was not meant to threaten criminal prosecutions. The State remains unconvinced and worries that the defendants still harbor thoughts of resorting to

criminal penalties in enforcing hunting laws against non-Indians. In addition, the State contends that the ostensibly civil penalty of forfeiture under the tribal laws is actually a criminal sanction.

The question of whether defendant Ducheneaux's statement really threatened criminal prosecution is largely collateral to the true issue in this case -- the extent of tribal authority over non-Indian hunters on various parts of the Cheyenne River Indian Reservation. Because this question presented is broad and because each counsel has demonstrated an ability to present relevant facts in a concise yet thorough fashion, this Court is inclined to preserve for trial the disputed contentions of the parties, including the argument of the State that the Tribe's present forfeiture statute is criminal in nature. Although there is limited evidence that the Tribe has or

intends to impose criminal penalties against non-Indian hunters, this Court after trial will be better able to evaluate the evidence of the State to the contrary. Consequently, it is premature to dismiss the portion of the complaint concerning criminal sanctions.

II. The United States as an Indispensable Party

Defendants seek dismissal of the complaint by arguing the United States is an indispensable party without whom the case cannot proceed. In short, defendants contend that the United States is indispensable because it holds title to the taking area and is a party to several compacts which have a bearing on resolution of this case. Defendants argue that the case cannot be effectively litigated absent the United States and that relitigation of issues involved in this case may occur if the United States is not a party to this suit.

Defendants suggest that the United States is amenable to suit under 5 U.S.C. § 702 and that suit should initially be brought in tribal court anyway.

The State answers that relitigation and inconsistent resolutions of the issues in this case are virtually inconceivable regardless of whether the United States is a party to the suit. In addition, the State argues that the United States is aware of this suit and can voluntarily intervene if it perceives that its interests are affected. Finally, the State contends that sovereign immunity bars suit against the United States and that there is no alternative forum in which to bring this suit.

There is no precise formula for determining whether a party is indispensable. Niles-Cement-Pond Co. v. Iron Moulders' Union No. 68, 254 U.S. 77, 80 (1920). Nevertheless, Rule 19 and a number of federal cases

provide substantial guidance in analyzing questions concerning joinder and indispensable parties. Rule 19(a) of the Federal Rules of Civil Procedure provides:

(a) Persons to be Joined if Feasible. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest. If the person has not been so joined, the court shall order that the person be made a party. . . .

Rule 19(a) defines who is an indispensable party. With regard to the claims concerning tribal regulation of non-

Indian hunting on non-Indian land, the United States is not an indispensable party. This case calls for interpretation of federal statutes and compacts, but the interest of the United States in adjudicating the right of the Tribe to regulate non-Indian hunting on fee land does not make the United States an indispensable party. Litigation of this case without joining the United States would neither impair its interest in non-Indian hunting on fee land nor subject other parties to multiple obligations concerning the fee lands. This Court still can enter a declaratory judgment as requested in the complaint and adjudicate the right to regulate non-Indian hunting on parts of the Cheyenne River Indian Reservation even if the United States does not participate in the case. The absence of the United States from this case does not impede entry of complete relief with regard to non-Indian hunting on

fee land. Consequently, the United States is not an indispensable party under Rule 19(a)(1).

The United States might be an indispensable party for adjudication of rights to regulate hunting on the taking area since the United States holds the title to the area. However, under Rule 19(b) of the Federal Rules of Civil Procedure, dismissal of this action would be inappropriate even if the United States is indispensable to litigate hunting rights on the taking area. Rule 19(b) states:

(b) Determination by Court Whenever Joinder not Feasible. If a person as described in sub-division (a)(1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be

prejudicial to the person or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

The doctrine of sovereign immunity prevents this Court from compelling the United States to participate in this suit. The United States is immune from suit unless it consents to be sued, and the terms of that consent define federal jurisdiction over a suit involving the United States. United States v. Mitchell, 445 U.S. 535, 538 (1980). Two noteworthy waivers of sovereign immunity are codified at 28 U.S.C. § 1346 and 5 U.S.C. § 702, but neither of these provisions would permit compelling the United States to participate in this suit. The parties have not cited any other statute which would waive

sovereign immunity in this case, and this Court is not aware of any such statute.

Since the sovereign immunity of the United States prevents joining the United States as a party, this Court must determine "whether in equity and good conscience the action should proceed." Rule 19(b) provides four factors to aid a court in determining whether to proceed without an indispensable party who cannot be joined. In addition, the United States Supreme Court has mentioned several policy considerations underlying Rule 19(b). Provident Tradesmens Bank & Trust Co. v. Patterson, 390 U.S. 102, 110-111 (1968); see also Nichols v. Rysavy, 809 F.2d 1317 (8th Cir. 1987), cert. denied, ___ U.S. ___, 108 S.Ct. 147, 98 L.Ed.2d 103. Having reviewed these factors and being quite familiar with this case, this Court in equity and good conscience concludes that the present parties should be allowed to proceed

with this case. The United States has been notified about the pendency of this case and can intervene or file amicus curiae briefs if it so desires.

III. Tribe as Indispensable Party

Defendants also argue for dismissal on the grounds that the failure to join the Cheyenne River Sioux Tribe prevents fair adjudication of the case. Presumably, the Tribe's sovereign immunity prohibits a suit directly against the Tribe, so the State has elected to sue two tribal officers, who have authority to enforce tribal hunting laws. The defendants argue that the suit should be against the Tribe and not against tribal officials and that tribal sovereign immunity bars this suit altogether absent tribal consent to be sued. Settled legal authority permits suit against tribal officers alleging that the officers took actions outside of the scope of their authority. Santa Clara Pueblo

v. Martinez, 436 U.S. 49, 59 (1978) (officer of tribe not protected from suit by tribe's sovereign immunity); Snow v. Quinault Indian Nation, 709 F.2d 1319, 1321 (9th Cir. 1983), cert. denied, 467 U.S. 1214 (1984) (tribal immunity does not bar suits alleging officer's conduct that is outside scope of a tribe's sovereign powers); Tenneco Oil v. Sac & Fox Tribe, 725 F.2d 572, 574-75 (10th Cir. 1984); Wisconsin v. Baker, 524 F. Supp. 726 (D. Wisc. 1981), modified, 698 F.2d 1323 (7th Cir. 1983), cert. denied, 463 U.S. 1207. It is primarily a factual question whether the actions of the defendants regarding tribal authority over non-Indian hunters are beyond the scope of the defendants' authority and thus whether a suit against tribal officers is appropriate. Resolution of this factual question at this time is premature; this Court will be in a much better position to evaluate such a question after trial.

A-232

Consequently, the defendants' motion to
dismiss is denied at this time.

BY THE COURT:

DONALD J. PORTER
CHIEF JUDGE

AUG 6 1992

OFFICE OF THE CLERK

In The
Supreme Court of the United States

October Term, 1992

STATE OF SOUTH DAKOTA, in its own
behalf, and as Parens Patriae,

Petitioner,

v.

GREGG BOURLAND, Personally and as Chairman
of the Cheyenne River Sioux Tribe and
DENNIS ROUSSEAU, Personally and as Director of
Cheyenne River Sioux Tribe Game, Fish and Parks,

Respondents.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit

OPPOSITION TO PETITION
FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Act of September 3, 1954, ch. 1260, 68 Stat. 1191, divested the Cheyenne River Sioux Tribe of its authority to regulate non-Indians hunting and fishing on reservation lands which were acquired by the United States for the construction and operation of a federal flood control project in light of: (1) the United States' pledge to restore the Tribe to its condition prior to the construction of the Reservoir; (2) the Tribe's retention of substantial rights in the acquired lands; and (3) the fact that continued tribal authority is consistent with the purposes for which the lands were acquired.

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No. 91-2051

In The
Supreme Court of the United States
October Term, 1992

STATE OF SOUTH DAKOTA, in its own
behalf, and as *Parens Patriae*,

Petitioner,

v.

GREGG BOURLAND, Personally and as Chairman
of the Cheyenne River Sioux Tribe and
DENNIS ROUSSEAU, Personally and as Director of
Cheyenne River Sioux Tribe Game, Fish and Parks,

Respondents.

**Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit**

**OPPOSITION TO PETITION
FOR WRIT OF CERTIORARI**

INTRODUCTION

In this case, a unanimous Court of Appeals ruled that the Cheyenne River Sioux Tribe may continue to regulate non-Indian hunting and fishing on the reservation lands which were taken from the Tribe and its members by the federal government for use in connection with the construction and operation of Oahe Reservoir. *South Dakota v. Bourland*, 949 F.2d 984 (8th Cir. 1991) (reprinted in the

Petitioner's Appendix (hereinafter "App.") at A-1). The lands in question were acquired by the United States under special federal legislation, the Act of September 3, 1954, ch. 1260, 68 Stat. 1191 (hereinafter "the Cheyenne River Act" or "the Act") (App. A-195), which had two purposes: (1) "the acquisition of [Indian] lands . . . required for the reservoir . . . [and (2)] the rehabilitation of the Indians of the Cheyenne River Sioux Reservation." *Id.* at 993 (App. A-33). The United States also obtained lands on the Reservation from non-Indians under the Flood Control Act of December 22, 1944, ch. 665, 58 Stat. 887, and the Eighth Circuit remanded the question of whether the Tribe could regulate such activities on the former non-Indian lands used in connection with the reservoir. The acquired tribal lands along with those obtained from non-Indians are commonly referred to as "the taken area."

In recognizing the continuing tribal authority over the former trust lands, the appellate court examined the Cheyenne River Act to ascertain its underlying intent and concluded that nothing in the language of the Act or its history suggested that Congress meant to diminish the Tribe's jurisdiction over hunting and fishing on the lands acquired by the federal government from the Tribe and its members. Rather, as the Court of Appeals explained, "the purpose of the Act was simply to enable the United States to acquire the land needed for the construction of Oahe Dam and Reservoir and to do so with as little disruption as possible to the life of the Tribe." *South Dakota v. Bourland*, 949 F.2d at 994 (A-40).

The Court of Appeals carefully considered the extensive authority of this Court related to the retained authority of Indian tribes and the application of those principles in instances in which a tribe seeks to regulate the activities of non-Indians. Because the lower court correctly applied the prior decisions of this Court in analyzing the Cheyenne River Act which only applies to the Cheyenne River Reservation and because the activities in question take place on the lands of the Tribe's guardian, the United States – which supported the Tribe's position in both the district court and the Court of Appeals – there is no need for this Court to review the decision of the Court of Appeals.

STATEMENT OF THE CASE

The eastern boundary of the Cheyenne River Reservation is the "center of the main channel of the Missouri River." Act of March 2, 1889, ch. 405, § 4, 25 Stat. 888; compare *Sioux Tribe of Indians v. United States*, 316 U.S. 317, 319 (1942). Historically, the River and bottom lands were the heart of tribal life on the Reservation. Minnicoujou, the name of one of the four bands of the Cheyenne River Sioux, translates as "Planters by the water." GARY E. MOULTON, *THE JOURNALS OF THE LEWIS AND CLARK EXPEDITION* 109 n.2 (1983). The original Cheyenne River Indian Agency, was near the site where Charger's Band of Sans Arc Sioux, another Cheyenne River Band, were located along the bottom lands of the River. H. R. Exec. Doc. No. 104, 51st Cong., 2 Sess. (1890). Although the Tribe lost

lands to non-Indian homesteading under the Surplus Lands Acts, the majority of the reservation lands along the Missouri River were not opened to non-Indian homesteading and the River and its bottom lands continued to play a vital role in tribal life until they were flooded by Oahe Reservoir. See Act of May 29, 1908, ch. 216, 35 Stat. 444.

The Tribe has continuously asserted jurisdiction over "all hunting and fishing activities on the reservation" including the area that is now held by its trustee, the United States. District court opinion (A-72).¹ Under the provisions of the Indian Reorganization Act of 1934, 25 U.S.C. §§ 461-479, the Tribe adopted a constitution which was approved by the Secretary of the Interior and which provided that "[t]he council shall pass ordinances for the control of hunting and fishing upon the reservation" By-Laws, art. VII, § 2, Exh. 1. In 1937, the Tribal Council enacted tribal ordinances, also approved by the Department of the Interior, which regulated hunting, fishing and trapping and which governed tribal members and "any nonmember . . . within the Reservation." Exh. 3. The tribal constitution provided for tribal jurisdiction throughout the reservation which included non-Indian lands. *Solem v. Bartlett*, 465 U.S. 463 (1984).

The Tribe's early conservation efforts were instrumental in the restoration of the wildlife on the Reservation and received national recognition. Exh. 61. At the

¹ The district court opinion is not reported. It is reprinted at App. A-56 to A-160.

time of the passage of the Cheyenne River Act, hunting and fishing were important tribal activities. See, e.g., H.R. Rep. No. 1047, 81st Cong., 1st Sess. 4 (1949) (Interior Report stating that the construction of Oahe Reservoir would result in the loss of "[w]ildlife which provides important feed for over 100 families" on the Cheyenne River Reservation).

The Cheyenne River Act was passed to enable the United States to acquire Indian lands on the Cheyenne River Sioux Reservation for the construction of Oahe Dam and Reservoir, which were part of the comprehensive plan for the improvement of the Missouri River Basin authorized under section 9 of the Flood Control Act of December 22, 1944, 58 Stat. 887, 891. H.R. Rep. No. 2484, 83d Cong., 2d Sess. 1 (1954). "The stated purposes of Lake Oahe were to allow 'the irrigation of 750,000 acres of land in the James River Basin as well as to provide useful storage for flood control, navigation, the development of hydroelectric power, and other purposes.' " *ETSI Pipeline Project v. Missouri*, 484 U.S. 495, 502 (1988), quoting S. Doc. No. 247, 78th Cong., 2d Sess. 3 (1944); see also section 10 of the Flood Control Act. The recreational use of the Project was of little significance and received only passing mention.

Although the Secretary of the Army was authorized to acquire lands necessary for the project under section 3 of the 1944 Act, additional authority was required for the acquisition of the Indian lands along the River. See *United States v. 2005.32 Acres of Land, More or Less*, Civil No. 722 N.D. (S.D. 1958), reprinted in H.R. Rep. No. 1888, 85th Cong., 2d Sess. 35 (1958); see also *United States v. Winnebago Tribe of Nebraska*, 542 F.2d 1002 (8th Cir. 1976). The

Cheyenne River Act stemmed from lengthy negotiations between the United States and the Tribe authorized by the Act of September 30, 1950, ch. 1120, 64 Stat. 1093. See H.R. Rep. No. 2484, *supra*. Although the Cheyenne River Act allowed the United States to acquire Indian lands on the Reservation, Congress expressed its intent to restore the condition of the Indian people after taking their most productive lands. In addition, a "[s]ignificant portion of the 'bundle of property rights' [in the taken area] explicitly were preserved for the Tribe." *South Dakota v. Bourland*, 949 F.2d at 993 (App. A-36).

When it passed the Cheyenne River Act, Congress noted the disastrous impact the Act would have on the Tribe. The Interior Committee explained that the construction of the Oahe Dam and Reservoir would "result in the flooding of over a third of a million acres of rich bottom land along the Missouri River." Indian families would be "faced with forced evacuation before 1961, when the project will be completed." H.R. Rep. No. 2484 at 5-6. The sacrifice imposed on the Tribe was described by the Committee:

Through no action of their own, the Indians must give up their homeland, their homes will be lost, their cattle raising industry will be ruined, many of their subsistence pursuits will be curtailed, their churches, schools, and social life will be completely disrupted, the residue of their lands will be reduced to a small fraction of their present value.

Id. at 6. The prediction of the suffering of the Indian people has proved true. See district court opinion (A-141 to A-142).

The Tribe has consistently exercised regulatory authority over the taken area. That authority is directly related to the retained tribal interests in the taken area where, as contemplated by the Act, the Tribe has sole responsibility for the leasing of the lands. Non-Indian hunting directly effects the Tribe's ability to use the taken area for the grazing purposes authorized under the Act. As the district court held, non-Indians hunting and fishing on the taken area have harassed tribal cattle, failed to close gates and have let down wires on fences. District court opinion (App. A-78).²

The Tribe likewise has a substantial interest in the fish and wildlife that is harvested on the taken area. "Virtually all the land adjacent to the taking area is trust land." *Id.* at (App. A-77). Thus, "[t]ribal lands contribute to the well-being of the deer herds on the taking area . . .," *Id.*, and "[d]eer harvested by nonmember hunters on the taken area . . . reduce the amount of deer available to tribal members." *Id.* at (App. A-75). Without the early tribal regulations, there might not be any deer herds at all. There is a major walleye fishery on the

² The district court rationalized this behavior by saying that tribal members engaged in the same conduct. But there was no testimony that the problems created by members were anywhere near as pervasive as those by non-Indians. In any event, the Tribe has authority to curtail the supposed activities of tribal members. The Court of Appeals never addressed the Tribe's challenge to the district court determinations along these lines.

Reservation which comes from natural recruitment from the Reservation and the adjacent waters of the Standing Rock Reservation. Fielder, TR at 85. In fact, the recruitment on the two Reservations supplies the fishery for the entire upper third of the reservoir. Even the eggs for the hatchery fish that supply the population in the remainder of the reservoir are taken from Reservation waters. Hanten, TR at 52.

Following a six day trial, the district court rejected the State's argument that the Cheyenne River Act resulted in the diminishment of the Reservation but concluded that the Tribe and its officials were barred from regulating nonmember hunting and fishing on the taken area. District court opinion (A-159). The court also held that the Tribe could not regulate nonmember hunting and fishing on reservation lands which were no longer held in trust. *Id.*

Supported by the United States as amici curiae, the tribal defendants appealed the district court's holding as to the taken area. The tribal defendants did not appeal the district court's holding based on *Montana v. United States*, 450 U.S. 544 (1981) and *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*, 492 U.S. 408 (1989), that the Tribe had lost its authority to regulate hunting and fishing on the non-Indian owned reservation land outside the taken area.

The Court of Appeals determined that the Tribe retained authority to regulate non-Indian hunting and

fishing on the former trust lands that are now part of the federal taken area. *South Dakota v. Bourland*, 949 F.2d 984 at 995 (A-42). The court did not address the tribal defendants' challenges to the district court's findings about the impact on the Tribe of denying it regulatory authority on these lands. The question of tribal authority over former non-Indian lands on the taken area, however, was remanded to the district court by the Eighth Circuit which found the district court's factual findings inadequate to deal with the issue. *Id.* at 995-96 (App. A-43 to A-46). No trial has been held on remand.

REASONS FOR DENYING THE WRIT

I. THIS CASE RAISES NO ISSUE OF GENERAL APPLICABILITY

The decision below turns on the Court of Appeals' interpretation of the Cheyenne River Act. *South Dakota v. Bourland*, 949 F.2d at 991 (App. A-27). That Act was the result of lengthy negotiations between the Tribe and representatives of the United States and is unique to the Cheyenne River Reservation. Indeed, each of the acts authorizing the acquisition of lands from the tribes along the Missouri River for use in the Flood Control Projects is different in certain aspects. See *Lower Brule Sioux Tribe v. South Dakota*, 711 F.2d 809, 821 n.13 (8th Cir. 1983), cert. denied, 464 U.S. 1042 (1984). As the State acknowledges, South Dakota has treated each differently. See Pet. at 41 n.13. Moreover, the Act is the product of the particular history of the exercise of tribal jurisdiction over hunting and fishing on the Cheyenne River Reservation where,

with the approval of the Secretary of the Interior, the Tribe had actively sought to restore game populations and to manage the reservation wildlife resources for many years prior to the passage of the Act. The Court of Appeals carefully analyzed the language of the Act, its history, and its surrounding circumstances to conclude that the Tribe retained authority over non-Indians hunting and fishing on former trust land on the taken area following the passage of the Cheyenne River Act.

South Dakota and the amici curiae States – none of whom presented their views to the Court of Appeal – overreach when they argue that the Court of Appeals' decision opens the door to widespread litigation over the rights of tribes to regulate non-Indian activities with regard to federal lands within Indian Reservations. That question turns on the intent of Congress, as the Court of Appeals acknowledged.

Congress has treated the acquisition of tribal lands and resources differently, depending on the purposes for which the tribal interests were acquired. For example, under the Federal Power Act, 16 U.S.C. § 797(e) (1988), the Federal Energy Regulatory Commission may issue hydroelectric licenses, even when the facilities are located on Indian Reservations. The Power Act requires the Commission to find that such licenses are consistent with the purposes for which the Reservation was created. *Id.* See *Escondido Mut. Water Co. v. La Jolla Band of Mission Indians*, 466 U.S. 765 (1984). Significantly, the Commission is expressly authorized to condition licenses with regard to the regulation and use of wildlife located within the license boundary. 16 U.S.C. § 797(e) (1988).

The upshot is that each federal acquisition of tribal land must be judged independently in light of the congressional purposes for the federal project in question. That is exactly the course followed by the Court of Appeals. There is no need for this Court to review the decision below because that decision interprets legislation that is applicable only to the Cheyenne River Indian Reservation and raises no issue of general significance.

II. THE COURT OF APPEALS PROPERLY APPLIED THE DECISIONS OF THIS COURT

A. *Montana v. United States and Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*, do not control this case.

South Dakota is wrong when it argues that the lower court failed to pay proper deference to the decisions of this Court in *Montana v. United States*, 450 U.S. 544 (1981) and *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*, 492 U.S. 408 (1989).³ The Court of Appeals conscientiously analyzed and applied those opinions but concluded that they did not foreclose continued tribal authority in the circumstances before it. See *South Dakota v. Bourland*, 949 F.2d at 991 (App. A-24 to A-27). In deciding that it must consider the congressional intent underlying the Cheyenne River Act, the Court of Appeals

³ As noted above, the district court relied on the teachings of those two cases to foreclose the Tribe from regulating hunting and fishing on non-Indian lands outside the taken area. The tribal defendants did not appeal that portion of the trial court's ruling.

quoted Justice White's plurality opinion in *Brendale*, 492 U.S. at 422-23, discussing this Court's opinion in *Montana*, 450 U.S. at 559:

We analyzed the effect of the Allotment Act on an Indian tribe's treaty rights to regulate activities of nonmembers on fee lands in *Montana*. . . . [W]e concluded that "treaty rights with respect to reservation lands must be read in light of the subsequent alienation of those lands." In *Montana*, as in the present cases, the lands at issue had been alienated under the Allotment Act, and the Court concluded that "[i]t defies common sense to suppose that Congress would intend that non-Indians purchasing allotted lands would become subject to tribal jurisdiction when an avowed purpose of the allotment policy was the ultimate destruction of tribal government."

South Dakota v. Bourland, 949 F.2d at 991 (App. A-26 to A-27), quoting *Brendale*, 492 U.S. at 422-23 (citations omitted) (emphasis added). Thus, the Eighth Circuit's analysis of the regulatory question was premised directly on this Court's reasoning in both *Montana*, 450 U.S. 544, and *Brendale*, 492 U.S. 408.⁴

Montana, 450 U.S. 544, and *Brendale*, 492 U.S. 408, construed the policy of the allotment acts as directed towards the elimination of tribal governmental authority

⁴ Incredibly, South Dakota attacks this aspect of the lower court decision on the basis that the statement in *Montana* about the effect of the allotment acts was only a footnote in response to the views of the lower court in that decision. Pet. at 26-27. South Dakota never addresses Justice White's clear statement in *Brendale* on which the Court of Appeals actually relied.

and concluded that the affected tribes no longer had authority over lands which passed out of Indian ownership as a result of legislation enacted pursuant to that policy. *Montana*, 450 U.S. at 559; *Brendale*, 492 U.S. at 423 (White, J.), 437 (Stevens, J.). The Court of Appeals correctly refused to accept South Dakota's reading of those cases – repeated here – as establishing a *per se* rule that the removal of tribal lands from trust status automatically obviates tribal jurisdiction over non-Indian activities on the lands and that there is no need to ascertain congressional intent in that regard. Instead, the Court of Appeals, consistent with the long-standing jurisprudence of this Court, examined the subsequent alienation of the lands in the Cheyenne River Act to resolve the question before it.⁵

The Cheyenne River Act is unequivocal that its sole purpose was to acquire the lands required for the construction and operation of Oahe Dam and Reservoir. See *Lower Brule Sioux Tribe v. South Dakota*, 711 F.2d at 820 ("[T]he reservation lands were taken for flood control projects rather than for settlement."). That task was to be

⁵ For the first time in this case, South Dakota, joined by the amici States, advocates in its Petition that *Montana* stands for the proposition that the Tribe's power to regulate stems only from its power to exclude and that once the Tribe is divested of its exclusionary authority, it may not continue to regulate the use of reservation resources on former trust lands now held by the United States. The short answer is that *Montana* does not address the question presented here. Nor is there any indication in *Montana* that when, by agreement with the United States, a tribe preserves certain interests in lands in which it originally had complete title, it may not continue to exercise regulatory authority over the use of those lands, even if it may not completely exclude non-Indians from the lands.

accomplished under a policy of restoring the Indian people of the Cheyenne River Reservation "to a condition not less advantageous" than prior to the Act. 68 Stat. at 1192 (App. A-200). There is no tension between the purposes for which the United States acquired the reservation lands and the continued tribal jurisdiction recognized by the appellate court.

The Tribe also unquestionably retained substantial interests in the lands to which the United States took title: In section VI, the Tribe reserved its mineral rights in the area (App. A-201); under section VII, the Tribe has the right to all timber in the area (App. A-202); and, under section X, the Tribe has the right to use the land for grazing as well as hunting and fishing. (App. A-205) These reserved interests and rights to use the land are entitled to great weight in analyzing the retained tribal sovereignty over the land in question since " 'use' is among the 'bundle of privileges that make up property or ownership' of property. . . . " *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 158 (1973) (Supreme Court holds that New Mexico may not apply its compensating use tax to tribal improvements on off-reservation land leased by the tribe.)

Thus, the Cheyenne River Act stands in stark contrast to the General Allotment Act of 1887, 25 U.S.C. § 331, and its progenies which are analyzed in *Montana*, 450 U.S. 544, and *Brendale*, 492 U.S. 408, and which have been construed to divest tribes of all their interests in the lands which passed out of Indian ownership and to allow non-Indians to obtain unrestricted title to reservation lands. *Blake v. Arnett*, 663 F.2d 906, 911 (9th Cir. 1981).

Further, unlike the legislation in *Montana*, 450 U.S. 544, and *Brendale*, 492 U.S. 408, which was aimed at the destruction of tribal governments, the passage of the Cheyenne River Act followed the repudiation of the allotment policy and the reaffirmation of tribal sovereignty in the Indian Reorganization Act of 1934, ch. 576, 48 Stat. 984 (codified as amended in scattered sections of 25 U.S.C.). See *Montana*, 450 U.S. at 559 n.9.⁶

To conclude, the Court of Appeals was correct in refusing to apply the holdings in *Montana*, 450 U.S. 544, and *Brendale*, 492 U.S. 408, to this case without considering the purposes of the Cheyenne River Act.

⁶ South Dakota also errs when it attempts to invoke the termination policy as a component of the Cheyenne River Act. First, the State is incorrect in asserting that Congress meant the Cheyenne River Act to constitute a back-door termination act. The expressed purpose of the Act was to restore the Tribe to the condition which existed prior to the Act. (App. A-200) Thus, the most that can be said is that those in Congress who favored the termination policy contemplated that at some future date it might be sought by the Tribe. See 100 Cong. Rec. 13,160 (1954). Congress and the executive branch have subsequently rejected the termination policy. Indian Financing Act of 1974, 25 U.S.C. §§ 1451-1543 (1988), Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. § 450-450m, *Special Message to the Congress on Indian Affairs* (Richard Nixon), Pub. Papers 564 (1970); see generally FELIX S. COHEN, *HANDBOOK OF FEDERAL INDIAN LAW* 184-88 (1982 Ed.); see also *California v. Cabazon Band of Indians*, 480 U.S. 202, 216-17 (1987) (President Reagan's 1983 Statement on Indian policy, reaffirming the self-determination policy for tribes).

B. The Court of Appeals used the Standards Established by this Court to Determine the Intent of Congress.

The established canon of construction to be applied to legislation such as the Cheyenne River Act in which the federal government acquires rights from Indian tribes is that "the wording of treaties and statutes ratifying agreements with the Indians is not to be construed to their prejudice." *Antoine v. Washington*, 420 U.S. 194, 199 (1975) (citations omitted). "The construction, instead of being strict, is liberal; doubtful expressions, instead of being resolved in favor of the United States, are to be resolved in favor of a weak and defenseless people, who are wards of the nation, and dependent wholly upon its protection and good faith." *Id.* at 200, quoting *Choate v. Trapp*, 224 U.S. 665, 675 (1912). See also *County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation*, 502 U.S. ___, 116 L.Ed.2d 687, 704 (1992). Those instructions are particularly applicable here since the Cheyenne River Act was the product of actual negotiations between the Tribe and the federal government.

The Court of Appeals properly utilized these long-standing rules of construction, citing to its earlier decision in *Lower Brule*, 711 F.2d 809, where it had previously resolved the question of whether the State could regulate tribal members hunting and fishing on the federal lands on the Lower Brule Reservation. *South Dakota v. Bourland*, 949 F.2d at 990 (App. A-23). The Eighth Circuit also invoked this court's caveat in *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 60 (1978) that "a proper respect for both tribal sovereignty itself and for the plenary authority of Congress in this area cautions that we tread lightly in the

absence of clear indications of legislative intent." *South Dakota v. Bourland*, 949 F.2d at 991 (App. A-23 to A-24). See also *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 152 (1982) (Because there was "no 'clear indications' that Congress had implicitly deprived the tribe of its power to impose the severance tax . . . [the Tribe retained] its inherent authority to tax mining activities on its lands, whether this authority derives from the Tribe's power of self-government or from its power to exclude.").

Strangely, the State limits its contention that the Court of Appeals applied the wrong standard to examine the Cheyenne River Act to the lower court's citation of *United States v. Dion*, 476 U.S. 734 (1986). But in its holding that there must be "clear indications" of congressional intent to deprive a tribe of its right to regulate the use of reservation resources by non-Indians, the Eighth Circuit also cited *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979), modified on other grounds, 444 U.S. 816 (1979), and *Menominee Tribe v. United States*, 391 U.S. 404 (1968), along with references to both *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9 (1987) and *Merrion*, 455 U.S. 130. *South Dakota v. Bourland*, 949 F.2d at 990-91, 994 (App. A-22 to A-25, A-40 to A-41). The lower court was correct in its use of those decisions, which all discuss the standard to be used when subsequent legislation must be construed with earlier treaty rights – precisely the question before it.

III. THE COURT OF APPEALS PROPERLY CONCLUDED THAT THE CHEYENNE RIVER ACT DID NOT DIVEST THE TRIBE OF JURISDICTION OVER NON-INDIANS HUNTING AND FISHING ON FORMER TRUST LANDS ON THE TAKEN AREA

As the Court of Appeals concluded, in passing the Cheyenne River Act, Congress gave no indication that it intended to divest the Tribe of its authority to regulate all hunting and fishing on the lands which were taken from the Tribe. The Act contains only one section in which the United States acquires any interest in the taken area. The language of that section establishes that the United States took only the title to the land and cannot be read to establish an intent to divest the Tribe of its sovereign powers over the taken area.

The reading of the Act to accomplish only a transfer of title – and not a divestiture of the existing regulatory authority of the Tribe – is further confirmed by the Senate and House Reports on the bill which describe the Act as “Providing for the Acquisition of Lands By the United States.” H.R. Rep. No. 2484 at 1; S. Rep. No. 2489, 83d Cong., 2d Sess. 1 (1954). The House Report unequivocally states the purpose of the bill to be “reimbursing the Indians . . . for lands acquired. . . .” H.R. Rep. No. 2484 at 2. And, of course, the Tribe retained substantial property interests in the lands in question.

The Tribe’s continued authority to regulate hunting and fishing on the taken area is supported by the legislative history of the Act. Perhaps most telling is the statement of the attorney for the Tribe in the hearings leading up to the bill that the Tribe had authority to regulate

hunting and fishing by non-Indians on its Reservation.⁷ *Acquisition of Lands and Rehabilitation of Cheyenne River Sioux Reservation, South Dakota and for Other Purposes: Hearings on H.R. 2233 and S. 655 Before the Comm. on Interior and Insular Affairs Joint Senate and House Subcomm. on Indian Affairs, 83d Cong., 2d Sess. 289 (1954) (unpublished) (“No white citizen of South Dakota can go on this reservation and hunt unless he has first obtained a license from the Tribal Council.”).*

Congress’ response in the resulting legislation was silence – an overwhelming indication that it did not intend to divest the Tribe of its authority to regulate non-Indian hunting and fishing on the Reservation. Such silence cannot support the conclusion advanced by South Dakota and the amici States that by obtaining some of the Tribe’s proprietary interests in the lands and thereby modifying the Tribe’s right to exclude others from the land, Congress necessarily – but sub silentio – divested the Tribe of its regulatory authority. In *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, this Court explained the difference between the sovereign authority of the Tribe and its proprietary interests, stating:

It is one thing to find that the Tribe has agreed to sell the right to use the land and take from it valuable minerals; it is quite another to find that the Tribe has abandoned its sovereign powers

⁷ By the time of the passage of the Act, it was clear that lands which were not held for the benefit of the Tribe or its members could still be part of the Reservation. At Cheyenne River, there were substantial non-Indian lands within the reservation boundaries. See *Solem v. Bartlett*, 465 U.S. 463.

simply because it has not expressly reserved them through a contract.

Id. at 146; see also *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. at 18.

The argument by South Dakota and the amici States that mere alienation is sufficient in all instances to divest a tribe of any regulatory authority therefore is doubly defective. First, it is not consistent with the prior decisions of this Court that tribal regulatory authority is not founded simply on tribal power to exclude. *Merrion v. Jicarilla Apache Tribe*, 455 U.S. at 146. Equally important, it ignores both the retained tribal interests in the former trust lands and the fact that even after Congress was advised of the Tribe's claim of regulatory authority over non-Indians hunting anywhere on the Reservation (which had been approved by the Secretary of the Interior), the Act contained no language curtailing the exercise of such tribal authority on the taken area.⁸

In sum, the Cheyenne River Sioux Tribe may regulate non-Indian hunting and fishing on its lands by virtue of its

⁸ In arguing that the Act is not consistent with tribal retention of jurisdiction to regulate hunting and fishing on the acquired land, the State places great weight on section 10 of the Act, contending that it only grants the Tribe and its members the right of free access to the taken area for hunting, fishing, and grazing. No more was required since the Act took only the Tribe's title to the land. Because the Tribe's sovereign powers continued unabated after enactment of the Act, the Tribe needed to retain in the Act only the right of access in order to use the resources of the taken area. Section X had been the subject of opposition by the Corps of Engineers which had sought its elimination, noting the complications it would cause. The Corps asked that the tribal lands be treated the same as any other obtained for use in the project. See H.R. Rep. No. 2484 at 13. The Corps' request was denied and the language of section X remained intact.

"substantial control over the lands and the resources of its reservation, including its wildlife." *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 337 (1983). "[T]ribes in general retain this authority." *Id.* See also *Merrion v. Jicarilla Apache Tribe*, 455 U.S. at 152. Because the Act was silent on the question of tribal regulatory authority and because there is no conflict between the continued exercise of that authority and the purposes for which the lands were acquired by the federal government, the trustee's acquisition of tribal title to the land in question by the United States did not result in the loss of the tribal power to regulate the use of those resources in which the Tribe has a retained interest.

IV. THERE IS NO REASON FOR THIS COURT TO REVIEW THE COURT OF APPEALS' REMAND OF THE QUESTION OF TRIBAL AUTHORITY OVER FORMER FEE LANDS IN THE TAKEN AREA

South Dakota urges this Court to review the Court of Appeals' order remanding the question of tribal jurisdiction over former non-Indian land taken by the United States. There is no need for this Court to review the interlocutory order since the court of Appeals simply remanded the issue to the district court, directing it to apply "the analysis used by Justice White in his plurality opinion in *Brendale*." *South Dakota v. Bourland*, 949 F.2d at 995 (citations omitted) (App. A-45). Finding the trial court's factual findings inadequate, the Eighth Circuit instructed the trial court to "undertake a *Montana* analysis." *Id.* at 995 (App. A-46). To be sure, the Court of Appeals cautioned that the means by which the Tribe lost title to the reservation lands in question must be

considered. *Id.* at 995 n.19 (App. A-45 n.19). But the analysis directed by the Court of Appeals should be completed before this Court considers whether to review the outcome.

f

CONCLUSION

In arguing for review of the decision of the Court of Appeals, South Dakota never acknowledges the fundamental and far-reaching differences between the Cheyenne River Act and the General Allotment Act of 1887. This case does not turn on the policies of the Allotment Acts, but instead turns on the intent of Congress when it passed the Cheyenne River Act which applies only to the Cheyenne River Indian Reservation. The Eighth Circuit applied the well-established rules of construction of this Court in concluding that Congress did not divest the Tribe of its jurisdiction to regulate hunting and fishing on the former trust lands on the federal taken area when it passed the Cheyenne River Act. Further, the lower court merely remanded to the district court the question of jurisdiction over former non-Indian lands. Accordingly, there is no need for this Court to review the

lower court's decision and the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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NO. 91-2051

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

STATE OF SOUTH DAKOTA IN ITS OWN
BEHALF, AND AS PARENS PATRIAE,

Petitioner,

v.

GREGG BOURLAND, PERSONALLY AND AS CHAIRMAN
OF THE CHEYENNE RIVER SIOUX TRIBE AND
DENNIS ROUSSEAU, PERSONALLY AND AS DIRECTOR
OF CHEYENNE RIVER SIOUX TRIBE
GAME, FISH AND PARKS,

Respondents.

REPLY TO OPPOSITION
TO PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

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INTRODUCTION

In this brief, the State of South Dakota replies to the argument of the Tribe set out in its "Opposition to Petition for Writ of Certiorari" (Op. Pet.). The most serious generic problem with the position with the

presentation of the Tribe is that it has failed to clearly identify the source of its alleged power over non-Indians on lands taken in fee by the United States for the construction of the Oahe Reservoir, the land at issue here. Second, the Tribe has, unfortunately, seriously distorted the record in several respects.

- A. The Tribe Does Not Have the Power to Regulate Non-Indians on the Federal Fee Lands and Overlying Waters at Issue Pursuant to Treaty or as a Component of its Inherent Sovereignty.

At the heart of the legal issue in this case is the source of the alleged authority of the Tribe to regulate non-Indians on 100,000 acres of land taken in fee from the Tribe and its members by the United States under the Cheyenne River Act of 1954, Pub.L. 83-776, 68 Stat. 1191 (1954), for

construction and operation of the vast Oahe Reservoir.¹

¹Also at issue are 18,000 acres of land presumed to be fee land originally conveyed to non-Indians under the General Allotment Act and then acquired from the non-Indians under the authority of the Flood Control Act of 1944, Pub.L. 78-534, 58 Stat. 887. The Court of Appeals remanded the issue of whether the Tribe had authority over these lands for an analysis in terms of Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation, 492 U.S. 408 (1989) and Montana v. United States, 450 U.S. 544 (1981). The direction of the Court of Appeals was incorrect, however, because it is clear from the opinion of Justice White in Brendale that the proof of the existence of the second of the two Montana exceptions, i.e., that relating to the impact of nonmember activity on the political integrity, economic security or health and welfare of the Tribe would give rise to federal court, not tribal court jurisdiction. 492 U.S. at 431. Furthermore, the direction of the Eighth Circuit is incorrect in that it indicates that if the lands were not taken under an "allotment act" the Montana exception may not apply and the analysis "may be" (not "may well be," see State's Pet. at 37) different. Montana-Brendale apply to all lands alienated by Indian tribes in the absence of a specific congressional delegation of power to the Tribes, as set out in the main argument of the State. As with most of the other points in this case, the Tribe has failed to respond to these arguments. See Op. Pet. at 21-22.

Two potential sources of power to regulate non-Indians have been discerned--a tribal power to exclude drawn from treaty and the inherent power of the Tribe. See Montana v. United States, 450 U.S. 544 (1981). As noted above, the Tribe has failed to inform the Court of its opinion regarding the source of its powers over non-Indians and has thus confounded the legal and factual issues. The Court of Appeals did make the critical distinction and found the source of tribal power to regulate non-Indians on the federal fee lands to be derived from the tribal exclusivity provisions of the Ft. Laramie Treaty of April 29, 1868, 15 Stat. 635 (1869). See Cir. Crt. Op. A-24.²

²It is, however, quite doubtful that the mere power to exclude non-Indians found by implication in the Ft. Laramie Treaty includes a general regulatory power over non-Indian persons without their consent, as the six Amici States demonstrate. See Brief of Amici Curiae States of Montana, Alabama, (continued...)

Assuming that the tribal exclusivity provision did carry the right to regulate non-Indians, it follows nonetheless that when the right to exclude is lost any "lesser included power" to regulate is lost. Since it is clear under the Flood Control Act of 1944, Pub.L. 534, 58 Stat. 889 (1944), 16 U.S.C. § 460d, and the 1954 Taking Act, 68 Stat. 1193 at § 10 that the Tribe does not retain a right to exclude non-Indians from this public land, it follows that this "power can no longer serve as the basis for tribal exercise of the lesser included power[.]" Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation, 492 U.S. 408, 424 (1989) (White, J.).³

²(...continued)
California, North Dakota, Utah, and Washington in Support of Petition for Writ of Certiorari at 5-7.

³Indeed, the circuit court opinion at A-42 states that the Tribe is not "free (continued...)"

The reliance of the Circuit Court, see Cir. Crt. Op. A-40 and 41 on United States v. Dion, 476 U.S. 734 (1986); Washington v. Washington State Commercial Passage of Fishing Vessel Assoc., 443 U.S. 658 (1979), modified on other grounds, 444 U.S. 816 (1979) and Menominee Tribe v. United States, 391 U.S. 404 (1968) to bolster its treaty power argument is simply misplaced. None of these cases considers whether a non-Indian would be subject to tribal jurisdiction.⁴

³(...continued)
entirely to exclude non-Indians" from taken area even under its incorrect decision.

⁴The Circuit Court's reliance on New Mexico v. Mescalero Apache Tribe, 462 U.S. 324 (1983) is even more troublesome given this Court's statement in Mescalero that:

Unlike this case, Montana concerned lands located within the reservation but not owned by the tribe or its members.

462 U.S. at 323-324. See Cir. Crt. Op. at 841 n.18.

Nor do Montana-Brendale suggest that a Dion-style analysis must be performed to determine whether tribal jurisdiction exists over non-Indians on non-Allotment Act lands alienated from tribal members. As Brendale states, the Montana court

flatly rejected the existence of a power, derived from the power to exclude, to regulate activities on lands from which the tribes can no longer exclude nonmembers.

Brendale, 492 U.S. at 424 (White, J.). (quoting Montana v. United States, 450 U.S. at 559). There is simply no room for a Dion analysis under the Montana-Brendale rule.

A second potential source of tribal power over non-Indians is the inherent power of the Tribe. The Tribe's repeated citation of Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982) suggests that this may be the source relied upon by the Tribe. Merrion, however, concerned the exercise of the Tribe's inherent power on trust lands and is

thus not on point. See 455 U.S. at 133.

Furthermore, as stated in Brendale, the

regulation of "relations between an Indian tribe and nonmembers of the tribe" is necessarily inconsistent with the tribe's dependent status, and therefore tribal sovereignty over such matters of "external relations" is divested.

Brendale, 492 U.S. at 427 (quoting United States v. Wheeler, 435 U.S. at 326). Because the matter here is entirely one of the external relations of the Tribe, tribal sovereignty has been divested.

Moreover, to the extent that the Tribe relies on the inherent sovereignty "second exception" in Montana, 450 U.S. at 566, to allege that it retains inherent authority because of the nature of activities of the non-Indians in the taken area, it is dispositive that the District Court found that the Tribe

need not regulate the hunting and fishing activities of nonmembers on the taken area . . . to protect its

political integrity, economic security or health or welfare.

Dist. Ct. Op. A-85.⁵

This general finding was not rejected by the Court of Appeals and notwithstanding the tribal implications to the contrary, is amply supported by the record. The Tribe contends that non-Indians on the take area have interfered with tribal cattle. Op. Pet. at 7. It then asserts, without citation, that such activities were "pervasive." Op. Pet. at 7 n.2. The District Court, however, found that "[g]enerally nonmembers hunting and fishing on the reservation have conducted themselves in a manner that does not threaten the legitimate tribal concerns for livestock grazing and the protection of other

⁵In any event, as the plurality opinion in Brendale makes clear, the existence of the Montana "second exception" factors gives rise only to federal, not tribal court jurisdiction. See Brendale, 492 U.S. at 430-431 (White, J.).

property." Dist. Crt. Op. A-78. Moreover, trial testimony showed that no complaints about nonmembers causing trouble or damage to cattle grazing on Corps of Engineers lands had ever been received by any federal, state or tribal officer in his official capacity. TR 499; TR 599-600; TR 927-928; PH 133; TR 612-613.

Second, the Tribe appears to assert that its lands alone contribute to the well-being of deer herds on the taking area. However, the same finding by the District Court as quoted by the Tribe also states:

As a white-tail deer may move up to twelve miles across its home range, all reservation lands, whether trust, deeded or public, sustain deer populations.

Dist. Crt. Op. A-77, A-78. Moreover, the Tribe cites no evidence in support of its bald assertion that there may not be any deer on the reservation without early tribal regulations. In fact, the District Court

found that although the Tribe had engaged in certain efforts in the 1930s and 1940s that until 1989 the Tribe had no ongoing wildlife surveys and had "no established conservation, depredation, or stocking program to protect and enhance" wildlife resources. Dist. Crt. Op. A-81.

The Tribe finally implies that it somehow is responsible for the fish population in the Oahe Reservoir. Op. Pet. at 7-8. At the time of trial, however, the Tribe had in place no "conservation, depredation or stocking programs. . ." to enhance fishery resources, Dist. Crt. Op. A-81, did no management at all on the Oahe Reservoir, TR 521, had only one boat which it had taken on the Missouri River "once" as a "demonstration," TR 506-507, and apparently had no plans to engage in fishery management on the Oahe Reservoir. See TR 839-840. In contrast, the State had engaged in the

stocking of 72 million fish in the Oahe Reservoir including rainbow trout, small-mouth bass, walleye, and chinook salmon in the period 1970-88, and had conducted myriad fish population and similar studies. Dist. Crt. Op. A-85, 86. The State also furthered fish management through "[e]nforcement of fishing regulations." Dist. Crt. Op. A-86. The Tribe ignores the fact that closely attentive management is necessary to deal with the progressive sedimentation or siltation of reservoirs, including the lower portions of the Oahe Reservoir adjacent to the Cheyenne Reservation, TR 26-29, 41-44, 78. See, e.g., Exhibit 173 (study of stocking of walleye fingerlings at various points on the reservoir, including points immediately adjacent to the Cheyenne River Reservation, id., Table 1).

The Tribe also appears to indicate that its interest would suffer because it has in

the past regularly enforced the provisions of its game and fish laws on non-Indians within the taken area. The admissions of the tribal Defendants, however, are to the contrary.

In particular, Tribal President Wayne Ducheneaux admitted at trial that prior to the pendency of this litigation, there had never been a single civil or criminal action brought by the Tribe against a nonmember or non-Indian in tribal court on a hunting and fishing violation occurring in any place within the taken area. TR 548-549. See also Testimony of Lenita Miner, Director of the Tribal Game, Fish and Parks at TR 517-518.⁶

⁶Indeed, the two statements indicate that the Tribe had not brought such actions against any non-Indian for any violation of hunting and fishing ordinances at any place on the reservation. It is of some interest to note that, in 1983, the Tribe in its public statement indicated that its licenses were valid "only on tribal land." Exhibit 214, JA 405. It was only in 1985, Exhibit 258, JA 423, in a decision implemented in 1988, see TR 527, that the
(continued...)

Further, in 1987, in the single instance in which the Tribe apprehended a non-Indian on Corps land prior to this litigation, the United States Fish and Wildlife Agent advised the tribal officers that they should release the non-Indian (which the tribal officers did do). Exhibit 257; TR 561-562.⁷ The

⁶(...continued)

Tribe began to consider abandoning its former stance of acquiescence of state jurisdiction and "go for total jurisdiction," see JA 405, including jurisdiction over non-Indians on fee lands including the public lands and waters.

⁷The Tribe at Op. Pet. 18-19 relies heavily upon a 1954 statement of the tribal attorney that "white citizens" needed a license from the tribal council to hunt and fish on the reservation; the Tribe unaccountably fails to note the District Court's analysis that "read in context" the tribal lawyer was referring to the situation at the time of the 1954 taking and "was not alluding to future jurisdiction of the Tribe over nonmember hunting and fishing once the lands were actually taken." Dist. Crt. Op. A-137-38. Indeed, the tribal lawyer specifically referred to the post-taking situation as one in which tribal members would have a "right of free access, including the right to hunt and fish on the shoreline, (continued...)"

District Court's findings with regard to this matter, see A-72, 73, should be read in light of the tribal concessions as set forth above.

B. Montana-Brendale May Not Be Distinguished Merely Because the Tribe was Granted or Retained Certain Interests in Lands to Which the United States Took Fee Title.

The Tribe contends that because Congress granted or retained in the Tribe certain interests in the Corps fee lands that Montana-Brendale are not applicable to this

⁷(...continued)
 subject, however, to regulations governing the corresponding use by other citizens of the United States." Acquisition of Lands and Rehabilitation of Cheyenne River Sioux Reservation, South Dakota, and For Other Purposes: Hearings on H.R. 2233 and S. 655 Before the Comm. on Interior and Insular Affairs Joint Senate and House Sub. Comm. on Indian Affairs, 83d Cong., 2d Sess. 289 (1954). The tribal lawyer certainly knew that a mere right of access did not contain a right to regulate others. See generally, New York ex rel. Kennedy v. Becker, 241 U.S. 556 (1916). Finally, it is noted that there certainly is no evidence in the record of actual tribal regulation of non-Indians on nontrust land at this time.

case.⁸ See Op. Pet. at i, 6, 14. The Tribe first points to a reservation of mineral rights in the take area but this reservation, which is "subject to all reasonable regulations which may be imposed by the chief of engineers," is simply irrelevant to hunting and fishing within the take area.

⁸Op. Pet. at 13 n.5, asserts that the State for the first time asserts that "Montana" finds that the Tribe's power to regulate stems "only" from its power to exclude. The State's Petition examines and rejects two potential sources of tribal regulatory power (i.e., treaty exclusion and inherent sovereignty). In addition, the State has effectively asserted that any power to regulate arising from a treaty right to exclude was lost when the right to exclude was lost through the 1954 Taking Act; the apparent tribal assertion that the State has cited only Brendale rather than Montana in each of its previous treaty based arguments is irrelevant and without merit. See, e.g., State's Trial Brief at 64-70 (citing Brendale quoting Montana); Appellee-Cross-Appellant's Brief at 36-39 (citing Brendale quoting Montana); id. at 47 n.13 (urging adoption of the rationale of the District Court which included a Montana analysis based on exclusionary authority, see, Dist. Ct. Op. 128-129, 134); Appellee's Petition for Rehearing with Suggestion for Rehearing En Banc at 8-9 (citing Montana).

The Tribe also contends that it has a "right to all timber in the area," Op. Pet. at 14, but neglects to add that this right expired long ago pursuant to § 9 of the 1954 Act. See App A-202; 203-204. The Tribe finally contends that § 10 provides for a tribal right to use the taken area for grazing as well as hunting and fishing. Op. Pet. at 14. This section provides, however, that the Tribe and its members would have only,

without cost, the right of free access to the shoreline of the reservoir including the right to hunt and fish on the aforesaid shoreline reservoir, subject, however, to regulations governing the corresponding use by other citizens of the United States.

A-205. When Congress provided that the Tribe would have merely a right of "access" for hunting and fishing "subject to" regulations which govern "other citizens," it made clear

its intention that the Tribe not itself regulate others on those lands and waters.⁹

C. The Position of the United States Adds Nothing to the Analysis.

The Tribe implies to this Court that the current support by the United States of its position is deserving of note. Op. Pet. at 3, 8. The opposite is true.

The Corps of Engineers, the agency with primary responsibility for the "take area," has consistently told the public in writing that hunting and fishing are allowed on the Oahe project area "in accordance with the rules and regulations established by . . . the South Dakota Game, Fish and Parks Department and the United States Fish and Wildlife Service." Corps of Engineers Recreational Boating Guide Map, P.H.Ex. 33. Similarly, a COE attorney told Congress as

⁹The Circuit Court hinted at but did not itself rely upon any "retained rights" analysis. See Cir. Crt. Op. A-36, 37.

recently as 1987 that "Senator, it is my understanding that . . . we would rely on the state agencies for enforcement of [game and fish] laws in those areas [the take areas]." Senate Hearing 100-500 (1987) at 12, JA 925.¹⁰

The abrupt and unexplained change of position of the United States endorsing tribal jurisdiction does not add to the analysis of this issue.

CONCLUSION

This case presents to the Court an opportunity to clarify the standards for determining the parameters of treaty-based and inherent tribal authority over non-Indians especially on governmentally owned property on reservations. Thus the Court's

¹⁰The discussion concerned two other reservations which are adjacent to the Missouri River mainstem but the statement clearly has application to the Cheyenne River Reservation take area in the State's view.

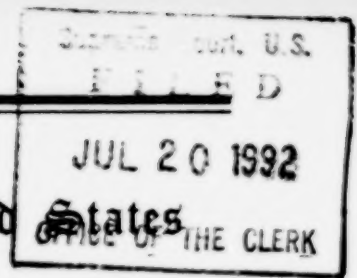
decision will have direct impact up and down the Missouri River, which may be "Balkanized" by the decision of the Eighth Circuit and will also impact other federal lands and private lands. Finally, this Court's resolution of the controversy may well lead to the return to a more harmonious situation between Indians and non-Indians in the western states. The State respectfully requests this Court to grant the Petition for Writ of Certiorari.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

THE STATE OF SOUTH DAKOTA IN ITS
OWN BEHALF, AND AS PARENS PATRIAE,
Petitioner,

v.

GREGG BOURLAND, PERSONALLY AND AS CHAIRMAN
OF THE CHEYENNE RIVER SIOUX TRIBE AND
DENNIS ROUSSEAU, PERSONALLY AND AS DIRECTOR
OF CHEYENNE RIVER SIOUX TRIBE
GAME, FISH AND PARKS,
Respondents.

**Petition for Writ of Certiorari to the
United States Court of Appeals
For the Eighth Circuit**

**BRIEF OF AMICUS CURIAE
INTERNATIONAL ASSOCIATION OF FISH AND
WILDLIFE AGENCIES IN SUPPORT OF
PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

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IN THE
Supreme Court of the United States
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No. 91-2051

THE STATE OF SOUTH DAKOTA IN ITS
OWN BEHALF, AND AS PARENS PATRIAE,
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v.

GREGG BOURLAND, PERSONALLY AND AS CHAIRMAN
OF THE CHEYENNE RIVER SIOUX TRIBE AND
DENNIS ROUSSEAU, PERSONALLY AND AS DIRECTOR
OF CHEYENNE RIVER SIOUX TRIBE
GAME, FISH AND PARKS,
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**BRIEF OF AMICUS CURIAE
INTERNATIONAL ASSOCIATION OF FISH AND
WILDLIFE AGENCIES IN SUPPORT OF
PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

The International Association of Fish and Wildlife Agencies, having obtained written consent of all parties to the case as required by Rule 37.2, submits this brief in support of the petition.

INTEREST OF AMICUS CURIAE

The International Association of Fish and Wildlife Agencies (hereinafter "the Association") is a District

of Columbia not-for-profit corporation dedicated to coordinating the efforts of public administrative agencies responsible for the protection and management of the fish and wildlife of North America. Founded at Yellowstone National Park in 1902, the Association numbers among its government members the fish and wildlife agencies of all fifty states.

The standard applied by the court of appeals to construe the Cheyenne River taking act defeats the intent of Congress by means of a rule which denies effect to the implications of the statute. Application of the *Bourland* standard within the Eighth Circuit could adversely affect state authority to regulate tribal nonmember hunting and fishing on thousands of acres of land taken for public flood control purposes in North Dakota and South Dakota. Such areas have been regarded as public areas open to hunting and fishing by nonmembers and subject to regulation by the state. In addition, application of the Eighth Circuit standard could unravel other native settlements enacted by Congress on which interested parties have come to rely.

SUMMARY OF ARGUMENT

1. Moving beyond the rule of liberal construction of ambiguous provisions to favor Indians, the court of appeals now declares that the implications of a congressional enactment restrictive of Indian treaty rights will be denied effect in the Eighth Circuit owing to the failure by Congress to state explicitly such implications. No standard enunciated by this Court declares that effect will be given to a congressional enactment only if congressional intent is explicitly stated. To the contrary, *Brendale v. Confederated*

Tribes & Bands of the Yakima Indian Nation, 492 U.S. 408 (1989), and *Montana v. United States*, 450 U.S. 544 (1981), recognized that implicit in the alienation of lands under the Allotment Acts is the dissolution of tribal authority over land owned by nonmembers within the reservation. The court of appeals distinguished *Brendale* and *Montana* as decisions founded upon "the intent to destroy tribal government underlying the Allotment Acts," (Petitioner's Appendix at A27) (hereinafter Pet. App.), found no such intent in the Cheyenne River Act, Pub. L. No. 83-776, 68 Stat. 1191 (1954), and proceeded to construe the settlement described in that act as if it were a law of general applicability. The court of appeals thus invoked the standard of *United States v. Dion*, 476 U.S. 734 (1986), a case involving prohibitions of general applicability, which requires clear evidence that Congress was aware of a conflict between its intended action and Indian treaty rights, and that Congress chose to resolve the conflict by abrogation. But the Cheyenne River Act is a law of special applicability to the tribe, and involves a "complete settlement of all claims, rights, and demands of said Tribe or allottees or heirs thereof arising out of the Oahe project." (Section II, Pet. App. at A197). While the *Dion* standard is an appropriate safeguard of Indian treaty rights against unintended dissolution by Congress in the context of the enactment of a law of general applicability, the application of the *Dion* standard to settlement legislation such as the Cheyenne River Act is not appropriate. Congress intended that Act to be a "complete settlement of all claims, rights, and demands," thereby obviating the need to itemize the constituent elements thereof. And where Congress intended that a particular tribal right con-

tinue, such as the right to hunt and fish within the taken area, Congress explicitly renewed it. (Section X, Pet. App. at A205).

2. Even *United States v. Dion*, 476 U.S. 734 (1986), does not require the precision demanded of Congress by the court of appeals. The court of appeals had before it the decision of the district court permanently enjoining tribal defendants from regulating hunting and fishing by nonmembers of the Cheyenne River Sioux Tribe on lands taken by the United States for flood control purposes. (Pet. App. at A2). Invoking *Dion*, the court of appeals proceeded to address the issue by examining the Cheyenne River Act, "to see if Congress clearly expressed an intent to divest the Tribe of regulatory authority over non-Indian hunting and fishing activity on the taken area." (Pet. App. at A27). But neither *Dion* nor any decision of this Court erects a standard so high that Congress will be deemed to have curtailed an Indian treaty right only if legislative language speaks to the precise issue. The Eighth Circuit standard effectively declares that the customary legal incidents implicit in actions taken by Congress will not be recognized by the courts unless Congress explicitly sets forth such incidents. Such a standard goes beyond judicial construction and comes close to judicial prescription.

ARGUMENT

1. **The Cheyenne River Act Is a Law of Special Applicability to the Tribe, in the Nature of the Allotment Acts Discussed in *Montana* and *Brendale*, Codifying a Settlement Agreement With the United States for Conveyance of Land in Exchange for Compensation. The Application of the *Dion* Standard to Specific Settlement Legislation Such As the Cheyenne River Act Is Not Appropriate.**

This case presents the question whether the Cheyenne River Sioux Tribe retains the authority to regulate the activities, specifically hunting and fishing, of tribal nonmembers on lands located within the exterior boundaries of the reservation but owned in fee by the United States following the passage of the Cheyenne River Act, Pub. L. No. 83-776, 68 Stat. 1191 (1954). That act was passed pursuant to the policy of the United States government to obtain title to lands located along the Missouri River in an effort to construct flood prevention measures including dams and reservoirs. H.R. Rep. No. 2484, 83d Cong., 2d Sess. 3 (1954).

In 1944, Congress enacted the Flood Control Act, Pub. L. No. 78-534, 58 Stat. 887, which authorized the government to enter into negotiations with landowners for the sale of such lands. (Pet. App. at A9). Under the authority of that Act, Congress passed Pub. L. 81-870, 64 Stat. 1093 (1950) (hereinafter Public Law 870) allowing for specific negotiations with the Cheyenne Sioux River Tribe, pursuant to which the government reached a settlement with the Tribe for the sale of such lands. (Pet. App. at A10). The ultimate agreement was codified in the Cheyenne River Act, and provided for compensation for lands and improvements taken, relocation and rehabilitation

costs, and final settlement of all tribal claims, rights and demands. Pub. L. No. 83-776 (Pet. App. at A196-A200).¹ Importantly, the Act also specified that the agreement was not effective until after acceptance in writing by three-fourths of all the adult tribal members. *Id.* (Pet. App. at A195).

Both Public Law 870 and the Cheyenne River Act are public laws specially applicable to the Cheyenne River Sioux Tribe. This Court previously addressed the impact of laws of special applicability upon a tribe's regulatory power over nonmembers in *Montana v. United States*, 450 U.S. 544 (1981) and *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*, 492 U.S. 408 (1989).

In *Montana*, this Court examined whether the Crow Tribe of Montana had the power to regulate hunting and fishing by nonmembers on reservation lands owned in fee by nonmembers. The Court found that arguably a power to regulate such nonmember activity arises from the power to exclude implicit in treaty provisions establishing reserved lands "set apart for the absolute and undisturbed use and occupation of the Indians."² 450 U.S. at 554, 558-59. However, that

¹ Specifically, the Cheyenne River Act provided that with regard to the taken lands, the Tribe retained mineral rights, the right to cut timber, the right to graze animals and the right of access to the reservoir, including the right to hunt and fish, "subject, however, to regulations governing the corresponding use by other citizens of the United States." Pub. L. No. 83-776 (Pet. App. at A201-A205).

² Treaty Between the United States of America and the Crow Tribe of Indians (Second Treaty of Fort Laramie), 15 Stat. 649, 650 (1868). The treaty also obligated the United States to restrict passage and residency of nonmembers over and upon the lands. *Id.*

absolute use and occupation was reduced following the passage of the General Allotment Act of 1887, 24 Stat. 388, and the Crow Allotment Act of 1920, Pub. L. No. 66-239, 41 Stat. 751. 450 U.S. at 558-59, which specifically authorized the issuance of fee patents to individual Indians on the reservation, and allowed for the alienation of those lands to non-Indians within 25 years. *Id.* at 548. Recognizing that "treaty rights with respect to reservation lands must be read in light of the subsequent alienation of those lands," this Court held that the Tribe possessed no authority to regulate nonmember hunting and fishing on fee lands owned by nonmembers within the reservation. *Id.* at 561.

In *Brendale*, this Court again spoke to the issue of tribal regulatory authority over nonmembers on fee lands, this time within the context of zoning. Applying the same analysis as in *Montana*, the four Justice plurality found that the underlying treaty established the reservation for the "exclusive use and benefit"³ of the Yakima Indian Nation. 492 U.S. at 422. However, because of the General Allotment Act, discussed *supra*, the Tribe's exclusive use of the fee lands was diminished. *Id.* The plurality agreed with the Court in *Montana* to the effect that the Tribe has no power to regulate the activities of nonmembers on lands from which the Tribe, as a result of specific acts of Congress, no longer has the right to exclude nonmembers. *See id.* at 424-25. This includes zoning as

³ Treaty Between the United States and the Yakima Nation of Indians, 12 Stat. 951, 952 (1859). The treaty further stipulated that no white man would be permitted to reside upon the reservation without permission from the Tribe. *Id.*

well as hunting and fishing.⁴ The opinion of Justices Stevens and O'Connor concluded that "by providing for the allotment and ultimate alienation of reservation land, the [Allotment] Act in some respects diminished tribal authority." *Id.* at 436.

As with the Allotment Acts in *Montana* and *Brendale*, Public Law 870 and the Cheyenne River Act are acts specially addressed to the Tribe itself. Even more than laws specially passed with Indians in mind, however, the Cheyenne River Act is by its very nature an enactment which the Indians themselves played a significant role in shaping; it represents a settlement agreement, see Pub. L. No. 81-870 (authorizing "the negotiation and ratification of separate settlement contracts") (Pet. App. at A187); Pub. L. No. 83-776 (describing the enactment as an "agreement between the United States of America and the Sioux Indians of Cheyenne River Reservation") (Pet. App. at A195), reached after several years of bargaining by both the Indians and the federal government, and its implications could not be more apparent. There can be no mistaking that the intent of the Congress, and of the Tribe, was to convey title and ownership of reservation lands to the United States

⁴ The Court did reaffirm the two exceptions noted by the Court in *Montana*, that the Tribe does possess the power, derived from its inherent sovereignty, to regulate nonmembers (1) if they have entered into consensual agreements with the Tribe or members of the tribe, or (2) if their activities threaten the welfare or security, or self-government of the Tribe. In those cases, however, consistent with prior precedent, the tribe's authority extends only to civil jurisdiction. *Brendale*, 492 U.S. at 428; see *Montana*, 450 U.S. at 565-66.

in exchange for compensation to the Tribe,⁵ and the Act is an obvious codification of the agreement as negotiated and approved by the government and the Indians. Despite the intent expressed in these acts of special applicability, and the obvious parallels between the instant case and *Montana* and *Brendale*, the court of appeals distinguished the latter as decisions founded upon "the intent to destroy tribal government underlying the Allotment Acts," (Pet. App. at A27). Finding no such intent in the Cheyenne River Act, the Eighth Circuit proceeded to construe the Act as if it were a law of general applicability.

The court of appeals applied the standard of *United States v. Dion*, 476 U.S. 734 (1986), a case involving prohibitions of general applicability.⁶ *Dion* requires that in order to abrogate an Indian treaty right, there must be clear evidence that Congress was aware of a conflict between its intended action and Indian treaty rights, and that Congress chose to resolve the conflict by abrogation. *Id.* at 739-40. In *Dion*, the Court addressed the question whether the Bald Eagle Protection Act, Pub. L. No. 76-567, 54 Stat. 250 (1940) (codified as amended at 16 U.S.C. §§ 668-668d), abrogated the right of Indians to hunt bald or golden

⁵ See, e.g., *Aquisition of Lands and Rehabilitation of Cheyenne River Sioux Reservation, 1954: Hearings on H.R. 2233 and S. 695 Before the Joint Senate and House Subcomm. on Indian Affairs*, 83d Cong., 2d Sess. 10-11 (1954) (Statement of B. Y. Berry, House Subcomm. Chairman) (calling the goal of negotiations "a fair and equitable settlement for the taking of [Indian] lands and properties on the Cheyenne River Reservation").

⁶ In its opinion in *Bourland*, the Eighth Circuit focused upon the notion of "abrogation" and applied a *Dion*-style analysis. See (Pet. App. at A24-A25, A27, A40).

eagles on reserved lands. While the Court recognized that Indians generally possess the exclusive right to hunt and fish on the lands reserved to them, it noted that Congress retains the right to abrogate rights granted by treaty if it does so expressly. *Id.* at 737-38 (citing *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903)). The Court found that the Bald Eagle Protection Act is a sweeping act making it a federal crime to take, possess or sell any bald or golden eagle. *Id.* at 740. However, the Act was amended to provide that Indians may obtain a permit allowing them to take such eagles for religious purposes. *Id.* at 740-44. The Court found that this amendment was clear evidence Congress considered the impact of the law upon Indians, and chose to abrogate their general right to hunt such birds, except by permit for religious purposes. *Id.* at 745.

While the *Dion* standard is an appropriate safeguard of Indian treaty rights against unintended dissolution by Congress in the context of the enactment of a law of general applicability, the application of the *Dion* standard to settlement legislation such as the Cheyenne River Act is clearly inappropriate. Application of *Dion* to such legislation carries with it a high likelihood of unraveling of the bargain to the extent that the implications of passages in settlement legislation providing for "complete settlement of all claims, rights, and demands" are not honored by the courts. The approach of the Eighth Circuit creates an impossible standard requiring Congress in settlement legislation involving Indian tribes to inventory all rights and lesser included powers sought to be extinguished or impaired.

2. Neither *Dion* Nor Any Decision of This Court Erects a Standard So High That Congress Will Be Deemed to Have Curtailed an Indian Treaty Right Only if the Legislative Language Speaks Explicitly to the Precise Issue.

The court of appeals has derived from *United States v. Dion*, 476 U.S. 734 (1986), a degree of precision required of Congressional enactments not present in the holding of the case itself. It reads into *Dion* the rule that Congress must "clearly express[] an intent to divest the Tribe of regulatory authority over non-Indian hunting and fishing activity on the taken area." (Pet. App. at A27). This standard, as enunciated by the Eighth Circuit, in effect declares that customary legal incidents implicit in actions taken by Congress will not be recognized by the courts unless Congress explicitly sets forth such incidents. Such a standard goes beyond the requirements of *Dion* and is contrary to the policy of this Court enunciated in *California State Bd. of Equalization v. Chemehuevi Indian Tribe*, 474 U.S. 9 (1986). There the Court rejected a construction adopted by the Ninth Circuit that a state statute must be explicit in order to be applicable to tribal members.

Chemehuevi involved the authority of the state of California to statutorily require tribal members to collect a state excise tax on cigarettes sold on reservation lands to nonmembers. The court of appeals contended that because the statute did not explicitly state that the tax was to be passed on to nonmember end-purchasers, the Tribe was not required to collect such taxes owing to the general prohibition against states attempting to tax tribes or tribal members. *Id.* at 10-11. This Court found that such an express statement was not required, since the legal incidents implicit in the statutory scheme indicated that if the

vendor was untaxable, the ultimate burden implicitly fell upon the non-Indian consumers of cigarettes purchased on Indian territory. Rather, the Court held that fair interpretation of the enactment is required to assess the legal incidents of an enactment. *Id.* at 11-12.

Neither *Chemehuevi* nor *Dion* require that direct implications of Congressional enactments be reflected by the courts. In reflecting such implications, the court of appeals comes close to prescribing an outcome rather than construing a statute.

CONCLUSION

For all the reasons set forth above, the petition for writ of certiorari should be granted.

Respectfully submitted,

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No. 91-2051

OFFICE OF THE CLERK

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STATE OF SOUTH DAKOTA IN ITS OWN BEHALF, AND
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Respondents.

**ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

**BRIEF OF *AMICI CURIAE* STATES OF MONTANA, ALABAMA,
CALIFORNIA, NORTH DAKOTA, UTAH AND WASHINGTON
IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI**

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The States of Montana, Alabama, California, North Dakota, Utah and Washington, through their respective Attorneys General, respectfully submit a brief *amicus curiae* pursuant to S. Ct. R. 37.2 in support of the petition for writ of certiorari.

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INTEREST OF AMICI CURIAE

Each State appearing as an *amicus curiae* has one or more Indian reservations within its boundaries. These reservations were created initially as areas where the affected tribe's members would have exclusive occupancy rights. Subsequent federal legislation, however, has eliminated that exclusivity in most instances. It is thus quite common for substantial amounts of reservation land to be owned not only by nonmembers but also by federal, state and local governments.

The complex land ownership and demographic patterns now characterizing many reservations raise difficult questions covering the extent to which tribes may exercise regulatory authority over the use of those lands by nonmembers. This Court has directly addressed this issue in two decisions: *Montana v. United States*, 450 U.S. 544 (1981), and *Brendale v. Confederated Tribes and Bands of Yakima Nation*, 492 U.S. 408 (1989). These decisions establish that tribes have little or no regulatory authority over the activity of nonmembers on nonmember-owned lands absent consent and suggest no principled basis for reaching a contrary conclusion with respect to nonmember activity on land owned by nontribal governmental entities. The Court of Appeals below nevertheless elected not to apply the reasoning of either *Montana* or *Brendale* to resolve the issue whether the Cheyenne River Sioux Tribe

possesses the authority to regulate non-Indian hunting and fishing on tribal lands taken by the United States in connection with carrying out the Flood Control Act of 1944, Pub. L. No. 78-534, 58 Stat. 887. The court instead implied a right to regulate non-Indian hunting and fishing under the territorial exclusivity provision of the Fort Laramie Treaty of April 29, 1868, 15 Stat. 635 (1869), and applied the rule of construction that treaty rights should not be deemed abrogated unless the intent to abrogate is manifest in the statute or associated legislative history. It found no abrogation because the involved taking statute, the Cheyenne River Act, Pub. L. No. 83-776, 68 Stat. 1191 (1954), was not animated by an intent to destroy tribal government -- unlike the allotment-era statutes pursuant to which the nonmember lands in *Montana* were removed from tribal status. *South Dakota v. Bourland*, 949 F.2d 984, 993 (8th Cir. 1991) (App. A-36). The Court of Appeals' decision as to the tribal lands taken under the Cheyenne River Act thus presents important questions concerning the scope of regulatory rights conferred under treaties or statutes with territorial exclusivity provisions and the proper analytical standards for determining whether those rights have been diminished or eliminated by later legislation. With respect to nontribal lands taken to carry out the Flood Control Act's purposes, the court remanded for further factfinding whether one of the exceptions identified in *Montana* to the general rule that tribes lack inherent regulatory authority over nonmembers was present. The remand order, if its merits are eventually deemed necessary to be addressed, raises the question whether, in light of *Brendale*, a tribe may ever exercise inherent regulatory jurisdiction over non-Indian hunting and fishing activity on nontribal lands.

The ramifications of the Court of Appeals' analysis are broad, since its reasoning is applicable to the full range of regulatory issues which may arise on governmentally-

owned property within Indian reservations. This reasoning, if followed by other courts, would also likely result, as it will almost certainly here, in even more confusion concerning the scope of tribal regulatory authority with respect to nonmembers. The lower court's decision presents a valuable opportunity to clarify those principles controlling determination of federally-conferred and inherent tribal regulatory authority -- clarification which the *amici* States believe is essential to avoid highly deleterious, ever-increasing jurisdictional conflicts between state and tribal governments.

-----◆----- SUMMARY OF THE ARGUMENT

A tribal right to regulate can have one of two sources: positive federal law or a tribe's retained, inherent authority. The Court of Appeals implied from the Fort Laramie Treaty of April 29, 1868, 15 Stat. 635 (1869), a right on behalf of the Cheyenne River Sioux Tribe to regulate non-Indian reservation hunting and fishing. Because the treaty did not expressly provide such a right, a substantial question exists whether any regulatory authority exists within the Tribe other than that emanating from its inherent powers. This question was discussed, but not squarely answered, in *Montana v. United States*, 450 U.S. 544 (1981), and should now be resolved.

Even if the Court of Appeals properly implied a grant of tribal regulatory authority from the Fort Laramie Treaty, that authority could emanate only from the Tribe's territorial exclusivity under the Treaty with respect to reservation lands. The Cheyenne River Act, Pub. L. No. 83-776, 68 Stat. 1191 (1954), however, unambiguously effected a cession of all real property ownership rights, except those relating to mineral estates, to the United

States for the purpose of creating a reservoir and adjacent shoreline to which the federal government, not the Tribe, would control access by nonmembers. Under these circumstances, the Court of Appeals' conclusion that a treaty-secured power to regulate non-Indian hunting and fishing continues within the area taken under the Cheyenne River Act effectively allows an implied right to survive the demise of the entitlement from which the right is derived. This conclusion draws no support from *Montana* and has significant consequences for the orderly regulation of government-owned lands within Indian reservations.

Determining the scope of inherent tribal authority requires analyzing the viability of the two-pronged *Montana* test in light of *Brendale v. Confederated Tribes and Bands of Yakima Nation*, 492 U.S. 408 (1989). The District Court applied that test and concluded that, with respect to the tribal lands taken under the Cheyenne River Act and nontribal lands taken under the Flood Control Act of 1944, Pub. L. No. 78-534, 58 Stat. 887, the Tribe's political integrity, economic security, or health or welfare was not imperiled by the lack of such authority. Should the Court of Appeals' conclusion concerning the existence of a treaty-secured regulatory right and that right's nonabrogation be reversed, the District Court's findings are determinative even if, under *Brendale*, the latter court should have first inquired into whether the affected tribal interests were subject to protection only through nontribal administrative or judicial proceedings. However, if the Court of Appeals' analysis as to the existence and nonabrogation of a treaty-conferred regulatory power is sustained, its remand order with respect to the nonmember land taken under the Flood Control Act raises the issue whether inherent tribal authority can serve as a basis for regulating non-Indian

hunting and fishing on those lands. This is an important and unresolved question.

ARGUMENT

1. The Fort Laramie Treaty of April 29, 1868, 15 Stat. 635 (1869), created a reservation for various tribes of the Sioux Indians, including the Cheyenne River Sioux Tribe. The reservation was for "the absolute and undisturbed use and occupation" of the tribes and, except for federal employees or agents and certain other designated persons, no non-Indians were "ever [to] be permitted to pass over, settle upon, or reside" within the reservation. *Id.* at 636. The Court recognized in *Montana v. United States*, 450 U.S. 544 (1981), that the identically-worded territorial exclusivity provision in the Fort Laramie Treaty of May 7, 1868, 15 Stat. 649 (1869), accorded the Crow Tribe "implicitly[]" the power to exclude others from [its reservation]" and "arguably conferred upon [it] the authority to control fishing and hunting on those lands." *Id.* at 554, 558 (emphasis supplied). The Court of Appeals construed the latter statement in *Montana* as establishing that the Sioux treaty "granted the Tribe an exclusive right to control hunting and fishing on the Reservation" -- a right which it would find abrogated only if "Congress clearly expressed an intent to divest the Tribe of [such] regulatory authority[.]" *South Dakota v. Bourland*, 949 F.2d 984, 991 (8th Cir. 1991) (App. A-24, A-27).

The Court of Appeals' reasoning raises important issues. The Fort Laramie Treaty did not expressly grant the Tribe regulatory authority over persons who were otherwise properly within the Cheyenne River Sioux

Reservation; it instead set aside an area within which the Tribe's members could reside and, federally-imposed restraints aside, be governed by tribal law or customs. The Court's analysis can thus be accepted only if a general right to regulate non-Indian¹ conduct within the Reservation is implied from the right to exclude. The Court of Appeals' reliance on *Montana* for the proposition that an implied regulatory right exists under the Treaty ignores this Court's careful use of the term "arguably." While the power to exclude may be a necessary corollary to territorial exclusivity, the right to regulate persons lawfully within a reservation is not. See *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 141 (1982) ("We are not persuaded by the dissent's attempt to limit an Indian tribe's authority to tax non-Indians by asserting that its only source is the tribe's power to exclude such persons from tribal lands. Limiting the tribes' authority to tax in this matter contradicts the conception that Indian tribes are domestic, dependent nations, as well as the common understanding that the sovereign taxing power is a tool for raising revenue necessary to cover the costs of government"). The treaty-abrogation decisions the Court of Appeals relied upon, finally, involved specific, textually-rooted rights. *United States v. Dion*, 476 U.S. 738 (1986) (partial abrogation of the treaty right to hunt by the Eagle

¹The Court of Appeals addressed only the issue whether the Tribe possessed authority to regulate non-Indian hunting and fishing, having concluded that the question of tribal authority over such activity by nonmember Indians had not been raised in the petitioner's amended complaint or tried below. 949 F.2d at 989-90 (App. A-19 - A-20). The correctness of the Court of Appeals' determination in this respect is not presented by the petition. It still bears mention that this Court has repeatedly treated non-Indians and nonmember Indians as similarly situated for purposes of determining the reach of tribal jurisdiction. E.g., *Duro v. Reina*, 110 S. Ct. 2053, 2060-61 (1990); *Rice v. Rehner*, 463 U.S. 713, 722 (1983); *Washington v. Confederated Tribes of Colville Indian Res.*, 447 U.S. 134, 161 (1980).

Protection Act); *Washington v. Washington State Commercial Passenger Fishing Vessel Association*, 443 U.S. 658 (1979) (treaty fishing right not abrogated by international convention); *Menominee Tribe v. United States*, 391 U.S. 404 (1968) (treaty hunting and fishing rights not abrogated by tribal termination act).

The Court of Appeals' implication of a treaty-secured right to regulate has far-reaching implications. First, the regulatory right would not be limited to hunting and fishing activity but would encompass all forms of civil regulation of non-Indian conduct occurring on the Reservation. The Tribe's regulatory power, if the Court of Appeals' reasoning is credited, thus logically extends to other matters such as imposing fees for recreational use of the Oahe Reservoir or requiring safe boating practices. Second, if the involved regulatory power is positively conferred by the Treaty, questions arise over whether such power, in view of its federally-delegated nature, must be exercised consistently with, *inter alia*, the due process constraints of the Fifth Amendment. Cf. *Duro*, 110 S. Ct. at 2064 ("[o]ur cases suggest constitutional limitations even on the ability of Congress to subject American citizens to criminal proceedings before a tribunal that does not provide constitutional protections as a matter of right"); *United States v. Wheeler*, 435 U.S. 313, 328 n.28 (1978) (leaving open the "interesting question" whether "a tribe which was deprived of [the sovereign power to prosecute its members] by statute or treaty and then regained it by statute or treaty would necessarily be an arm of the Federal Government"). The lower court's uncritical implication of an implied right to regulate on the basis of the territorial exclusivity provision in the Fort Laramie Treaty raises an important question which should be reviewed.

2. Even if the Court of Appeals properly implied a right under the Fort Laramie Treaty to regulate non-Indian hunting and fishing, its abrogation analysis represents an unusual, if not a wholly idiosyncratic, reading of *Montana*. While the latter decision did observe in a footnote that allotment-era statutes could not be viewed as supporting the existence of tribal regulatory jurisdiction over non-Indian hunting and fishing on non-Indian fee lands (450 U.S. at 559 n.9), the Court stated more broadly in the text that the Crow Tribe's arguable hunting and fishing regulatory power "could only extend to land on which the Tribe exercises 'absolute and undisturbed use and occupation[.]'" (*id.* at 559). Nothing in *Montana* remotely suggested that, for purposes of determining whether a regulatory right implied from the promise of territorial exclusivity has been abrogated, a clear intention to abrogate the implied right must appear in the legislation or legislative history abrogating the territorial exclusivity entitlement itself. Since the Cheyenne River Sioux Tribe no longer possesses the power to exclude nonmembers from land taken under the Cheyenne River Act, Pub. L. No. 83-776, 68 Stat. 1191 (1954), "that power can no longer serve as the basis for tribal exercise of the lesser included power[.]" *Brendale v. Confederated Tribes and Bands of Yakima Nation*, 492 U.S. 408, 424 (1989) (White, J.). Indeed, the Court's resolution of the streambed ownership issue with respect to the Big Horn River in *Montana* was relevant to the general regulatory issue presented only because the United States and the Crow Tribe sought "to establish part of their claim of power to control hunting and fishing on the reservation by asking us to recognize their title to the bed of the Big Horn River." 450 U.S. at 550; *see also Brendale*, 492 U.S. at 443 (Stevens, J.) (in *Montana* "we held that the State owned the bed of the Big Horn River and thus rejected the Tribe's contention that it was entitled to regulate fishing

and duck hunting in the river based on its purported ownership interest"). It makes no sense to read *Montana* as leaving open the question whether the Crow Tribe could regulate nonmember hunting and fishing on the Big Horn River in view of the Court's rejecting the very predicate for the assertion of tribal authority, even though *Montana*'s title to the streambed was derived from Equal Footing Doctrine principles and not from an allotment-era statute.

The Court of Appeals' treatment of *Montana* has more than mere academic importance. Modern Indian reservations contain large amounts of land which passed out of tribal ownership other than through the General Allotment Act, 24 Stat. 388 (1887) (*codified as amended at* 25 U.S.C. §§ 331-334, 339, 341, 342, 348, 349, 354), and related statutes. In the State of Montana, for example, the federally-owned Yellowtail Dam and Reservoir is located within the Crow Reservation on lands purchased in accordance with Senate Joint Resolution No. 12, Pub. L. No. 85-523, 72 Stat. 361 (1958), and the State, together with the federal government, regulates activities on the reservoir. The joint resolution cannot be said to have the destruction of tribal government as its goal. *Montana* additionally was conveyed sections 16 and 36 of lands within four of its seven Indian reservations for school purposes in allotment-era statutes, but it is equally difficult to conclude that such conveyances were for the purpose of destroying the affected tribes' governmental structure rather than for the purpose of fostering education of reservation children. *See* Act of March 1, 1907, 34 Stat. 1015, 1035 (Blackfeet Reservation); Act of June 4, 1920, 41 Stat. 751, 756-57 (Crow Reservation); Act of April 23, 1904, 33 Stat. 302, 303-04 (Flathead Reservation); Act of May 30, 1908, 35 Stat. 558, 561 (Fort Peck Reservation). The decision below, if followed by other circuits, will result in substantial jurisdictional confusion and conflict.

3. Finding no treaty-right abrogation, the Court of Appeals did not address the issue whether the Tribe's inherent authority could serve as a basis for the exercise of regulatory jurisdiction over non-Indian hunting and fishing within the 100,000 acres of land taken under the Cheyenne River Act. It did discuss that issue, however, in connection with the 18,000 acres of land taken from nonmembers pursuant to the Flood Control Act of 1944, Pub. L. No. 78-534, 58 Stat. 887. 949 F.2d at 995 (App. A-43 - A-46). With respect to the latter taken lands, the court relied on the District Court's finding that they were in an "open" area of the Reservation and stated that "the analysis used by Justice White in his plurality opinion in *Brendale* should be applied to this acreage" -- an analysis which it deemed to require application of both *Montana* exceptions. *Id.* (App. A-45 - A-46). The court remanded the case for such analysis since, while the District Court had concluded neither exception was applicable, it had done so without differentiating between areas taken under the Flood Control Act and those taken under the Cheyenne River Act.

The *amici* States believe the Court of Appeals misconstrued Justice White's plurality opinion in *Brendale*. Rather than determining that the tribes there conceivably had a right to exercise zoning authority over any of the nonmember-owned lands at issue, the plurality opinion held the opposite. It noted the use of the term "may" in the formulation of the second *Montana* exception -- a use which "indicates to us that a tribe's authority need not extend to all conduct that 'threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe,' but instead depends on the circumstances." 492 U.S. at 429. It further remarked "that a literal application of the second exception would make little sense in the circumstances of

these cases" because "[t]o hold that the Tribe has authority to zone fee land when the activity on that land has the specified effect on Indian properties would mean that the authority would last only so long as the threatening use continued." *Id.* at 429-30. "*Montana*," the plurality opinion then stated,

should therefore not be understood to vest zoning authority in the tribe when fee land is used in certain ways. The governing principle is that the tribe has no authority itself, by way of tribal ordinance or actions in tribal courts, to regulate the use of fee land. The inquiry thus becomes whether, and to what extent, the tribe has a protectible interest in what activities are taking place on fee land within the reservation and, if it has such an interest, how it may be protected. ... [¶] Since the tribes' protectible interest is one arising under federal law, the Supremacy Clause requires state and local governments ... to recognize and respect that interest in the course of their activities. The Tribe in this case, as it should have, first appeared in the county zoning proceedings, but its submission should have been, not that the county was without zoning authority over fee land within the reservation, but that its tribal interests were imperiled. The federal courts had jurisdiction to entertain the Tribe's suit for declaratory and injunctive relief, but given that the county has jurisdiction to zone fee lands on the reservation and would be enjoined only if it failed to respect the rights of the Tribe under federal law, the proper course for the District Court in the *Brendale* phase of this case would have been to stay its hand until the zoning proceedings had been completed. At that time, a judgment could be made as to whether the uses

that were actually authorized on Brendale's property imperiled the political integrity, the economic security, or the health or welfare of the Tribe.

Id. at 430-31 (footnote omitted). Although the *Brendale* plurality opinion does not entirely foreclose use of the second *Montana* exception as a basis for the exercise of inherent tribal authority over nonmembers in a civil regulatory context, it is difficult to envision a situation where use of such authority, as opposed to invocation of nontribal administrative or judicial procedures, would be appropriate.

Whether the Court of Appeals' interpretation of *Brendale* is correct need be considered only if its treaty-abrogation analysis with respect to the tribal lands taken under the Cheyenne River Act is accepted. The District Court's findings established unequivocally that no impairment of the Tribe's political integrity, economic security, or health or welfare had arisen by virtue of non-Indian hunting on all taken lands.² However, should the

²The District Court's findings after trial concerning the second *Montana* exception were quite extensive. In part the court determined: (1) "[i]t does not appear that subsistence hunting and fishing is widely practiced by present Cheyenne River Sioux Indians" (App. A-75); (2) "[t]ribal regulation of nonmember hunting on the taken area and nonmember fee lands is not necessary to protect hunting by tribal members for subsistence purposes" (*id.*); (3) "[t]he past subsistence needs of tribal members have been met despite nonmember hunting on the taken area and fee lands" (App. A-77); (4) "[t]ribal regulation of nonmember fishing on the shoreline of the taken area is not necessary to protect fishing by tribal members for subsistence purposes" (*id.*); (5) "[g]enerally nonmembers hunting and fishing on the reservation have conducted themselves in a manner that does not threaten legitimate tribal concerns for livestock" (App. A-78); and (6) "[i]n sum, the Tribe need not regulate the hunting and fishing activities of nonmembers on the taken area and

(continued...)

treaty-abrogation analysis below be upheld, the propriety of the remand order becomes material, and it is unclear how exercise of tribal regulatory jurisdiction over the nonmember-lands taken under the Flood Control Act would be any more practical than the exercise of tribal zoning authority in *Brendale*. Here, as there, tribal authority would at most be coextensive with those activities which "imperil" a "protectible interest" and would "last only so long as the threatening use continued." The Court of Appeals' decision thus may afford an opportunity to clarify whether the second *Montana* exception has other than *de minimis* viability as justification for the assertion of inherent tribal regulatory authority and, if it does, to explore those factors relevant to determining when such authority is present.

³(...continued)

the nonmember fee lands to protect its political integrity, economic security, or health or welfare" (App. A-89). The District Court did not make any findings concerning the consensual-relationship exception, but no consent to tribal regulation appears to have existed.

⁴What constitutes the Tribe's protectible interest under present circumstances is less than certain. The initial alienation of the lands eventually taken from nonmembers under the Flood Control Act presumably vitiated any absolute entitlement to hunt or fish on those lands or any right to a specific share of the game or fish harvested therefrom.

CONCLUSION

The *amici* States respectfully request that the petition for writ of certiorari be granted.

Respectfully submitted,

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July 1992

NOV 18 1992

OFFICE OF THE CLERK

No. 91-2051

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

STATE OF SOUTH DAKOTA IN ITS OWN
BEHALF, AND AS PARENS PATRIAE,

Petitioner,

v.

GREGG BOURLAND, PERSONALLY AND AS CHAIRMAN
OF THE CHEYENNE RIVER SIOUX TRIBE AND
DENNIS ROUSSEAU, PERSONALLY AND AS DIRECTOR
OF CHEYENNE RIVER SIOUX TRIBE
GAME, FISH AND PARKS,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

JOINT APPENDIX--VOLUME ONE

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Docket Entries

CIV88-3049

State of South Dakota v. Wayne Ducheneaux

DATE	NR	PROCEEDINGS
1988		
Nov. 10	2	COMPLAINT filed.
Nov. 10	3	Plff'S APPLICATION for Temporary Restraining Order filed.
Nov. 10	6	Temporary RESTRAINING ORDER filed.
Nov. 18	9	ORDER Extending Temporary Restraining Order until 11/28/88 and Scheduling Hearing for 11/22/88 @ 10:00 AM in Pierre is [sic] parties do not resolve this dispute filed.
Nov. 22	12	AMENDED COMPLAINT filed.
Nov. 22		Enter HEARING on Oral Arguments for Preliminary Injunction before the Hon. Donald J. Porter, Chief Judge, presiding. Ruling Reserved.
Nov. 28		Enter HEARING on Preliminary Injunction before the Hon. Donald J. Porter, Chief Judge, presiding.
Nov. 29		Enter CONTINUATION OF HEARING on Preliminary Injunction before the Hon. Donald J. Porter, Chief

Judge, presiding. Ruling Reserved.

Nov. 29 13 ORDER continuing Order of 11/18/88 until the earlier of 12/8/88 or a decision by this Court on the Preliminary Injunction Issue filed.

Dec. 2 19 ANSWER to Amended Complaint filed.

Dec. 6 22 MEMORNADUM [sic] OPINION filed.

Dec. 6 23 ORDER issuing preliminary injunction to enjoin Dfdt's from enforcing or causing to be enforced tribal hunting & fishing laws against state-licensed, non-Indian hunters or fishers on non-Indian fee lands and that no preliminary injunction shall issue w/regard to enforcement of tribal game laws upon state-licensed, non-Indians hunting or fishing on the "taking land" owned by the Corp of Engineers and that litigants shall conduct discovery and prepare in a speedy fashion so the merits can be tried in the near future filed.

Dec. 13 28 Pre-Trial ORDER Scheduling Court Trial for 7/12/89 @ 9:30 AM and setting deadline for amending pleadings for 1/6/89; deadline for filing motions for 4/1/89 and deadline for discovery for 4/1/89 filed.

1989

Jan. 9 31 Plff's. MOTION to Amend Complaint filed. Copy fur. court.

Feb. 2 36 ORDER granting plff's. motion to file their Second Amended Complaint filed.

Feb. 6 37 SECOND AMENDED COMPLAINT filed.

Feb. 10 38 Dfdts' ANSWER to Second Amended Complaint filed.

Mar. 22 47 ORDER Extending Discovery Deadline till 6/1/89 filed.

Mar. 27 48 Tribal Dfdts' MOTION to Dismiss for Failure to Join Indispensable Parties filed. Copy fur. Court.

May 8 62 Plff's RESPONSE to Dfdts' Motion to Dismiss filed.

May 10 63 Tribal Dfdts'. MOTION to Reschedule Trial Date filed. Copy fur. to Court.

VOL.III

May 22 68 JOINT MOTION for Continuance of Trial filed. Copy fur. Court.

July 3 81 MEMORANDUM OPINION filed.

VOL. IV

Oct. 17 132 Plff's. Designation of WITNESSES filed.

Oct. 17 133 Plff's. TRIAL BRIEF w/attachments (attachments in expandos)

VOL. V

Oct. 17 134 Dfdts' PRE-TRIAL MEMORANDUM and RESPONSE to the Court's Order of October, 1989 w/attachments (attachments in expando)

Oct. 18 137 Dfdts' REPLY MEMORANDUM in Support of their Motion in Limine filed.

Oct. 23 153 Dfdt's. MEMORANDUM in Response to the State's Pretrial Brief filed.

Oct. 24 157 REPLY BRIEF of State of South Dakota to Defendants' PreTrial Memorandum filed.

Oct. 24 Enter PRE-TRIAL CONFERENCE before the Hon. Donald J. Porter, Chief Judge, presiding.

Oct. 25 Enter COURT TRIAL PROCEEDINGS before the Hon. Donald J. Porter, Chief Judge, presiding.

Oct. 26 Enter COURT TRIAL PROCEEDINGS before the Hon. Donald J. Porter, Chief Judge, presiding.

Oct. 27 Enter COURT TRIAL PROCEEDINGS

before the Hon. Donald J. Porter, Chief Judge, presiding.

Oct. 30 Enter COURT TRIAL PROCEEDINGS before the Hon. Donald J. Porter, Chief Judge, presiding.

Oct. 31 Enter COURT TRIAL PROCEEDINGS before the Hon. Donald J. Porter, Chief Judge, presiding.

Nov. 1 161 EXHIBIT LIST filed.

Nov. 1 Enter COURT TRIAL PROCEEDINGS before the Hon. Donald J. Porter, Chief Judge, presiding. Ruling Reserved.

Nov. 16 162 Plff's APPLICATION for Temporary Restraining Order filed.

Nov. 16 163 Plff's BRIEF in Support of Application for Temporary Restraining Order filed.

Nov. 17 165 Dfdt's RESPONSE to State's Application for Temporary Restraining Order filed

Nov. 17 166 ORDER that dfdts. shall be enjoined from enforcing tribal hunting regulations on non-Indians on the Corps taking area during the remainder of the deer season filed.

Nov. 22 167 Dfdts' MOTION to Dissolve Temporary Restraining Order filed. Copy fur. court.

Nov. 28 173 ORDER Dismissing Dfdt's Motion

to Dissolve the Temporary Restraining Order as Moot filed.

1990

Jan. 5 179 ORDER that the parties shall simultaneously submit proposed findings by 2/5/90, at 5:00 p.m. C.S.T. and further Ordered that the parties shall have twenty days thereafter in which to file a reply to opposing counsel's proposed findings filed.

Jan. 30 181 Amended ORDER that Plff. file brief and proposed findings on or before 5:00 PM on 2/5/90 and Dfdt. file answering brief and proposed findings on or before 5:00 PM on 2/26/90 and that simultaneous reply briefs be filed on or before 3/13/90 filed [sic].

Feb. 1 183 AMENDED ORDER scheduling Simultaneous [sic] Briefs for 2/26/90 by 5:00 PM and simultaneous reply briefs for 3/13/90 by 5:00 PM filed.

Feb. 26 184 Tribal Dfdts'. FINDINGS of Facts filed unattached in expando.

Feb. 26 185 Tribal Dfdts'. Post Trial MEMORANDUM filed unattached in expando.

Feb. 26 187 FINDINGS of Fact Proposed by Plff. filed.

Feb. 26 188 BRIEF in Support of Entry of

Findings of Fact Proposed by Plff. filed.

Feb. 28 189 Plff's MOTION for Extension of Time for Filing Reply Briefs filed. Copy fur. Court.

Mar. 2 190 ORDER granting plff's. Motion for Extension of Time for filing reply briefs to 3/26/90 filed.

Mar. 6 191 Govt's MOTION to File Amicus Curiae Memorandum filed. Copy fur. Court.

Mar. 7 192 ORDER Granting Govt's Motion to File Amicus Curiae Memorandum filed.

Mar. 7 193 Govt's Amicus Curiae MEMORANDUM filed.

VOL. 7

Mar. 26 194 Tribal Dfdts.' Post Trial REPLY Memorandum filed.

Mar. 26 196 State's RESPONSE to Tribal Dfdts' Proposed Findings of Fact filed. (in expando)

Mar. 26 197 State's Post-Trial REPLY Brief filed.

Aug. 21 198 MEMORANDUM OPINION filed.

Aug. 22 199 ORDERED that the Judgment of the Court is rendered as set out in the Memorandum Opinion filed.

Sept. 19 200 NOTICE of APPEAL filed.

Oct. 2 202 NOTICE OF APPEAL filed.
1992

Apr. 28 204 C. copy of ORDER from U.S. Court
of Appeals denying Appellee's
motion for stay of the mandate.

May 6 205 OPINION from U.S. Court of
Appeals affirming in part and
reversing in part Judgment of
this Court.

May 6 206 MANDATE from U.S. Court of
Appeals affirming in part and
reversing in part Judgment of
this Court.

7/6/92 208 NOTICE of filing petition for
certiorari (cm) [Entry date
7/9/92] [Edit date 7/9/92]

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
CENTRAL DIVISION

DONALD J. PORTER
CHIEF JUDGE
413 U.S. COURTHOUSE
PIERRE, SOUTH DAKOTA 57501

December 5, 1988

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RE: CIVIL NO. 88-3049
STATE OF SOUTH DAKOTA, Plaintiff,
vs.
WAYNE DUCHENEAUX, personally and as
Chairman of the Cheyenne River Sioux
Tribe, and LENITA MINER, personally and
as Director of Cheyenne River Sioux Tribe
Game, Fish and Parks, Defendants.

Dear Counsel:

MEMORANDUM OPINION

On November 10, 1988, the state filed a complaint in the above captioned case to seek injunctive and declaratory relief against defendants Ducheneaux and Miner, two officials of the Cheyenne River Sioux Tribe, to prevent the defendants from enforcing tribal hunting laws upon state-licensed non-Indians hunting deer on non-Indian and Army Corps of Engineers land within the Cheyenne River Indian Reservation. Fearful of confrontation between armed non-Indian deer hunters and tribal game wardens, this Court on November 10 issued a temporary restraining order, which subsequently was extended until and including November 28, 1988. The deer season for those hunting with rifles in western South Dakota expired on November 27, 1988.

On November 22, 1988, this Court heard oral arguments on whether to dissolve the

temporary restraining order or to issue a preliminary injunction. The state on that same day filed an amended complaint extending the complaint and prayer to include all hunting and fishing, instead of just deer hunting. Understandably, defendants were unprepared at the November 22 hearing to present facts regarding fishing and hunting animals other than deer. This Court therefore decided against modifying the temporary restraining order or issuing other injunctive relief, and instead held evidentiary hearings on November 28 and 29, 1988, to evaluate several difficult factual questions relating to injunctive relief.

The defendants assert that they have authority to regulate all hunting and fishing on both fee land and on the "taking area." The taking area is a gerrymandered strip of land adjacent to the Missouri River and Lake Oahe on the eastern end of the Cheyenne River

Indian Reservation. The Army Corps of Engineers owns the land, which was taken from private owners in 1954 for development of the Missouri River and Lake Oahe. Much of the taking area is fenced as parts of range units maintained by Indian ranchers who have grazing rights on the taking area. It is nearly impossible without a map to know the boundaries of the taking area since the land is not generally fenced or otherwise demarcated from trust or fee land. In many cases, hunters¹ pass through Indian land to access the taking area.

At the November 28 hearing, defendants agreed to refrain from enforcing tribal hunting laws on fee lands held by non-Indians.

¹This memorandum opinion concentrates on hunting since the bulk of the testimony in this case has focused on hunting. Everything said in this opinion regarding hunting and hunters is meant to include fishing and fishermen.

The defendants do not concede that they lack authority over these lands, but merely have chosen not to object at this time to the entry of a preliminary injunction regarding non-Indian fee lands. Defendants have further agreed to provide two weeks notice if they desire to change their position. Therefore, the only issue presently before this Court is whether to grant a preliminary injunction to prevent the defendants from enforcing tribal game laws on the taking area.

II. DISCUSSION

A. Standard for Issuing a Preliminary Injunction

Rule 65 of the Federal Rules of Civil Procedure authorizes this Court to issue a preliminary injunction. To determine whether to grant a preliminary injunction, this Court must consider four factors: 1) threat of irreparable harm to the movant; 2) balance between this harm and the injury that granting

the injunction will inflict on other litigants; 3) probability that movant will succeed on the merits; and 4) public interest. Dataphase Systems, Inc. v. C L Systems, Inc., 640 F.2d 109, 113 (8th Cir. 1981)

A movant must show a threat of irreparable harm or the motion for a preliminary injunction will be denied. Gelco Corp. v. Coniston Partners, 811 F.2d 414, 418 (8th Cir. 1987); Harris v. United States, 745 F.2d 535, 536 (8th Cir. 1984); Roberts v. Van Buren Public Schools, 731 F.2d 523 , 526 (8th Cir. 1984). Because the state has failed to make a sufficient showing of irreparable injury, this Court refuses to issue a preliminary injunction with regard to the taking area.

B. Threat of Irreparable Harm to the State

The state contends that absent injunctive relief, it is threatened by three types of

irreparable injury: 1) confrontation involving state-licensed hunters and tribal game wardens; 2) decreased value and marketability of the state licenses; and 3) disruption of the state's wildlife management program.

1. Confrontation

Any enforcement of hunting laws involves a certain amount of "confrontation". This Court, however, must decide whether the confrontation resulting from attempts by tribal officials to enforce tribal game laws on state-licensed non-Indian hunters poses a threat of irreparable injury sufficient to merit injunctive relief. There are two ways in which confrontation may pose a threat of irreparable injury: 1) resistance by state-licensed non-Indian hunters to the authority of the tribal wardens possibly resulting in armed hostilities; and 2) tribal overreaching in law enforcement.

Hostile Resistance

Ron Catlin, the law enforcement staff specialist for the state's Game, Fish and Parks Department, and Don McCrea, the state's wildlife conservation officer for Ziebach County, both testified that physical confrontations between state game wardens and violators of game laws are quite rare. N. Dennis Rousseau, a game warden for the Cheyenne River Sioux Tribe's Game, Fish and Parks Department, similarly reported that he had never experienced serious resistance to his enforcement of tribal laws. Though the state game officials appear to be much better trained and educated in game management, the tribal wardens receive instruction on how to approach hunters and enforce the law. Tribal game wardens have confronted non-Indian hunters presumed to be in violation of tribal hunting law on three occasions. Each situation was resolved peaceably.

Historically, tribal game wardens have sought to avoid confrontation although by allowing non-Indians improperly hunting without a tribal license to buy the \$8 sticker rather than aggressively pursuing civil charges or confiscating property. Therefore, the evidence suggests that tribal wardens will not encounter hostile resistance to tribal authority from a state-licensed hunter on the taking land.

In addition, enforcement of tribal hunting laws on the taking area does not pose as much a threat of "confrontation" as would tribal enforcement on non-Indian lands. The taking land has a distinct Indian flavor since it is owned by the federal government and largely controlled by Indians through grazing agreements. In contrast, a state-licensed hunter on non-Indian fee land would be more likely to resist tribal authority since the land is generally not under Indian control and

may indeed be owned by the hunter or the hunter's non-Indian friend.

Tribal Overreaching

A possible second threat of confrontation is tribal overreaching of its enforcement authority. Conceivably, the state would be irreparably injured if the defendants were to enforce tribal laws in such a manner as to exceed the limited tribal authority over non-Indians or deny non-Indians constitutional rights. See Greywater v. Joshua, 846 F.2d 486, 492 (8th Cir. 1988) (limited tribal authority over non-Indians); National Ass'n of Psychiatric Treatment Centers v. Weinberger, 661 F.Supp. 76, 81 (D.Colo. 1986) (impact of challenged actions on other interested parties besides the litigants is relevant to evaluating injury); Walker v. Wegner, 477 F.Supp. 648, 653 (D.S.D. 1979), aff'd, 624 F.2d 60 (abridgement of first amendment freedoms is an irreparable injury).

Historically, tribal enforcement of its hunting laws against non-Indians has been far from aggressive unreasonableness. In two instances, the tribe has sought to enforce its hunting laws arguably beyond its authority.² In both instances, tribal officials cooperatively rectified the situations. The tribe has not criminally prosecuted or imposed

²In 1987, tribal game warden N. Dennis Rousseau stopped a non-Indian named Michael Keys on the taking area for improperly-hunting deer. After checking with state and federal officials, Rousseau was told that the tribe lacked jurisdiction, so no action was pursued against Keys.

In another instance, several deer hunters were stopped by a tribal game warden for hunting deer on non-Indian fee land without a tribal license. The hunters simply purchased licenses from the tribe at that time. After the tribe learned that under present law no tribal license was required of non-Indians hunting on non-Indian lands, the tribe allowed the hunters to return to the reservation after deer season had ended and to hunt deer on Indian lands. Whether the tribe indeed lacked authority in these two instances is the question that this Court must resolve when the case is submitted on the merits. What is noteworthy now is that the tribe did not act unreasonably and was quick to correct perceived mistakes.

severe or unfair penalties on non-Indian hunters.

The state emphasized throughout the hearings that the tribe's original announcement before the deer hunting season about enforcement of tribal game laws mentioned that the tribe would prosecute all violators of its game laws. The state also stressed that defendant Ducheneaux has reaffirmed that the tribe would enforce its hunting laws against non-Indians if allowed to do so. Given the history of tribal enforcement, this court believes that defendants and the tribe's three game wardens will not pursue aggressive, overreaching enforcement of tribal game codes against non-Indians on the taking area. If the defendants' enforcement of hunting laws on the taking area trammels non-Indian rights, this court would entertain a motion to modify the preliminary injunction. Presently, the threat

of confrontation is far too speculative to qualify as a threat or irreparable injury. See Salant Acquisition Corp. v. Manhattan Industries, Inc., 682 F.Supp. 199, 202 (S.D.N.Y. 1988) (threat of irreparable injury must be actual or imminent, not remote or speculative).

2. Effect on License Value and Marketability

The state argues that if the tribe has the ability to regulate and perhaps severely restrict non-Indian hunting, the value and sales of the state licenses will drop as non-Indian hunters will become increasingly reluctant to hunt on the reservation. Courts usually are reluctant to grant a preliminary injunction when the alleged injury is merely pecuniary in nature. See, e.g., Regents of University of California v. American Broadcasting Companies, Inc., 747 F.2d 511, 519 (9th Cir. 1984); Perpetual Bldg. Ltd.

Partnership v. District of Columbia, 618 F.Supp. 603, 615 (D.D.C. 1985). Monetary loss frequently is not a irreparable injury since money damages caused by another's unlawful activities usually are recoverable and thus remediable. Morton v. Beyer, 822 F.2d 364, 372 (3d Cir. 1987); Dos Santos v. Columbus-Cuneo-Cabrini Medical Center, 684 F.2d 1346, 1349 (7th Cir. 1982). The entry of a preliminary injunction regarding fee land safeguards the value of the state license with respect to non-Indian hunting on private non-Indian land. The refusal to extend the preliminary injunction to the taking area will not appreciably affect the value and sales of state licenses for several reasons. First, the taking area is a relatively small part of the reservation; few people apparently buy state licenses to hunt exclusively on the taking area. Second, there is no indication that the tribe will enforce its law on the

taking area to discourage non-Indians from hunting there altogether. Moreover, if this Court ultimately determines that the tribal defendants lack authority over the taking area, the state may be able to recover damages to the value of state licenses incurred as a result of tribal enforcement of its hunting laws in the taking area. See Danden Petroleum, Inc. v Northern Natural Gas Co., 615 F.Supp. 1093, 1099 (N. Tex. 1985) (injury is irreparable only if it cannot be undone through monetary relief). Therefore, shared regulation of hunting on the taking land during the pendency of this case does not pose a threat or irreparable injury to the value and marketability of state licenses.

3. Game Management

The State engages in detailed game management throughout the Cheyenne River Indian Reservation by stocking fish, safeguarding habitats and monitoring wildlife.

The tribe meanwhile does very little game management. The state contends that failure to preliminarily enjoin the tribal officers from enforcing their game laws would disrupt state management of game in Dewey and Zeibach counties.

The state's argument has merit in that tribal control of hunting throughout the reservation could frustrate the state programs for carefully controlled and preserved game population and habitat. However, according to the testimony of Wesley Rice, the senior biologist of the state Game, Fish & Parks Department, the state is able to effectively manage wildlife on the reservation despite exclusively controlling hunting on only half of the land.³ Since the state can effectively

³The preliminary injunction preserves the state's exclusive control of hunting by non-Indians on non-Indian lands. Approximately half of the reservation land is non-Indian fee land.

manage game without 100% exclusive control of reservation hunting, allowing shared regulation of the relatively small strip of land called the taking area will not irreparably injure state game management. Moreover, the tribe does not seek to disrupt state game management policies. Indeed, notwithstanding this litigation, the state conservation officers and tribal game wardens appear to enjoy an amicable relationship.

C. Conclusion

The state has not met its burden of showing a threat of irreparable injury if the defendants are allowed to enforce their hunting laws on the taking area. The conclusion is based on a review of the situation as it presently exists. If tribal hunting laws are enforced in a manner detrimental to the state, this court may reconsider this decision. This ruling on the preliminary injunction does not imply a view

on the merits or on whether the tribe could successfully challenge a preliminary injunction concerning non-Indian fee land. This ruling similarly is not meant to discourage state enforcement of state hunting laws on the taking land.

BY THE COURT:

DONALD J. PORTER
CHIEF JUDGE

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
CENTRAL DIVISION

STATE OF SOUTH DAKOTA,)	Civ. 88-3049
in its own behalf, and)	
as parens patriae,)	
)	
Plaintiff,)	SECOND
)	AMENDED
v.)	COMPLAINT
)	
WAYNE DUCHENEAUX,)	
personally and as)	
Chairman of the Cheyenne)	
River Sioux Tribe and)	
LENITA MINER, personally)	
and as Director of)	
Cheyenne River Sioux)	
Tribe Game, Fish and)	
Parks)	
)	
Defendants.)	

COMES NOW the State of South Dakota in this action brought by and through its Attorney General and states:

I

This is an action by the State of South Dakota on its own behalf and on behalf of its citizens parens patriae against Wayne Ducheneaux and Lenita Miner seeking to

restrain and prohibit them from attempting to exclude non-Indians from hunting and fishing on non-Indian lands and waters purportedly within the Cheyenne River Sioux Reservation and from subjecting non-Indians to the criminal jurisdiction of the Cheyenne River Sioux Tribe and seeking declaratory relief. This action concerns hunting and fishing of all species, not merely deer, although the imminence of the deer seasons coupled with the Defendants' abrupt and illegal actions just before the opening of that season, precipitated the filing of the action.

II

Jurisdiction in this Court is invoked pursuant to the provisions of 28 U.S.C. § 1331, 1343(4), and 1337.

III

This case arises under various federal laws and statutes, including, but not limited to, the General Allotment Act, 25 U.S.C.

§ 331, et seq.; 18 U.S.C. § 1165; the Flood Control Act of 1944, § 4, codified at 16 U.S.C. 460d, and 36 CFR 327.26(b) and (c).

IV

This action is brought pursuant to the Declaratory Judgment Act, 28 U.S.C. §§ 2201 and 2202. Preliminary and permanent injunctive relief is authorized by Rule 65 of the Rules of Civil Procedure.

V

Venue is properly in this Court in accordance with 28 U.S.C., § 1391(e) because the case of action arose and Plaintiff resides in the Central Division.

VI

The State of South Dakota is one of the states of the Federal Union and brings this action both on its own behalf and on behalf of its citizens *parens patriae*.

VII

Defendant Wayne Ducheneaux is Chairman of the Cheyenne River Sioux Tribe. Defendant Lenita Miner is the Director of the Cheyenne River Sioux Tribe's Game, Fish and Parks Program, or its equivalent

FACTS

I

The State of South Dakota has conscientiously and in good faith sought to make an agreement regarding hunting with the Cheyenne River Sioux Tribe. It commenced its negotiations regarding the current season two to three months prior to the filing of the original pleadings in this case, by submitting a proposed agreement to the tribe. After discussions with the tribe, a second proposed agreement was submitted in which the State of South Dakota made further concessions to the tribe.

During the negotiations, the State agreed to reduce the number of licenses from its 700

proposal. The conservation officer for Ziebach County believed 1000 licenses should have been issued. Approximately 359 licenses were actually sold by the State in Dewey and Ziebach Counties.

II

On November 8, and 9, 1988, the tribe made additional demands of the State. The tribe demanded that the State require that non-Indians have the permission of the tribe to hunt on lands taken by the Corps of Engineers for the Missouri River Reservoirs before hunting on such lands. The State of South Dakota declined to agree with such a demand.

III

Defendants thereupon notified the State of South Dakota, and also notified the radio stations, that the tribe would demand a tribal license for any person, Indian or non-Indian, who wished to hunt on all lands within the

reservation. Defendants demanded that non-Indians hunting on non-Indian land have a tribal license. Defendants demanded that non-Indians hunting on Corps of Engineers land have a tribal license.

IV

Defendants further announced that they would cause to be arrested and prosecuted non-Indians who hunted on fee lands or on public lands within the lands and waters considered by them to be part of the reservation in tribal court.

V

The tribe has never in the past systematically prohibited non-Indians from hunting on fee or public lands or waters on the areas referred to in paragraph IV.

VI

About half the land and water in Ziebach and Dewey Counties is non-Indian and is directly impacted by the Defendants' action.

VII

The State of South Dakota has sold approximately 359 deer hunting licenses for Dewey and Ziebach Counties within the boundaries of the Cheyenne River Sioux Reservation. While these licenses may not be used on tribally-owned or trust lands within the reservation without a license from the tribe, should it so demand, the licenses remain valid for fee land and public land on the reservation without a tribal license.

VIII

The deer hunting season opened November 12, 1988 and continued to November 27. In addition, a number of seasons other than deer are affected by the position taken by Defendants. Some of those seasons that are affected are as follows:

- a. archery deer--Oct. 1 thru Dec. 31.
- b. grouse--Sept. 17 thru Dec. 4.
- c. partridge--Sept. 17 thru Dec. 4.
- d. pheasant--Sept. 17 thru Dec. 4.
- e. Canada geese--Oct. 8 thru Dec. 25.

- f. light geese--Oct. 8 thru Jan. 1.
- g. ducks--Dec. 10 thru Dec. 21.
- h. mink, weasel--Oct. 29 thru Jan. 15.
- i. muskrat & beaver--year around.
- j. coyote, fox, raccoon, jackrabbit, badger--year around.
- k. fishing--all species--year around seasons both in Missouri River and lakes of Dewey and Ziebach Counties (except spearfishing and paddlefishing).

IX

Defendants have threatened to arrest and criminally prosecute non-Indians who attempt to engage in hunting and fishing on lands and waters purportedly within the reservation without a tribal license. The Cheyenne River Sioux Tribe game wardens are armed with weapons.

X

The value of licenses issued by the State of South Dakota to non-Indians for hunting and fishing in Dewey and Ziebach Counties is seriously impaired by the Defendants' threats and wrongful assertions of authority.

XI

The State of South Dakota has an obligation and duty to protect its citizens, Indians and non-Indians, against unlawful exertions of authority by the Defendants, and in particular, to protect them against the threat of criminal prosecution in tribal court and to protect them in their right to hunt and fish on fee and public lands and waters actually or purportedly within the reservation.

XII

The Constitution of the Cheyenne River Sioux Tribe at Art. 4, § 1(k) provides that the tribe shall have authority to try and punish only "members of the tribe."

XIII

Exhaustion of tribal remedies is not mandated in this case because the actions of the Defendants are patently violative of the express jurisdictional prohibitions set forth by decree of the United States Supreme Court

and of the tribal constitution; moreover, exhaustion is not required because the acts of the Defendants are plainly motivated by a desire to harass as is evidenced by the timing and manner of the Defendants' action; finally, exhaustion is not required because the Defendants' actions are taken in bad faith.

XIV

Neither Defendant may invoke sovereign immunity in this case because their joint and separate actions are beyond authority allowed them under the constitution and laws of the United States and the constitution and by-laws of the tribe.

XV

Public Law 870-81 (1950) and Public Law 776-83 (1954) had the effect of diminishing the Cheyenne River Sioux Reservation as to areas taken by the United States at least at the time the tribe approved Public Law 776-83 (1954) by a 75 percent vote.

FIRST CLAIM FOR RELIEF

By embarking on the policy of arresting and prosecuting non-Indians in tribal court, the Defendants are acting contrary to the clear mandate of the United States Supreme Court in Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978) and of their own constitution. The Defendants have no jurisdiction to arrest or try any non-Indian for any reason.

SECOND CLAIM FOR RELIEF

A non-Indian holding a state license for lands and waters within Dewey and Ziebach Counties may hunt without interference by the Defendants on non-Indian owned lands and waters, including fee and public lands and overlying waters, including those of the Missouri River within the actual or purported boundaries of the reservation pursuant to the General Allotment Act, 25 U.S.C., § 331; Montana v. United States, 450 U.S. 544 (1981);

Flood Control Act of 1944, § 4 codified at 16 U.S.C. § 460d and 36 CFR 327.26. The present attempt of the Defendants to interfere with these rights is without basis.

THIRD CLAIM FOR RELIEF

In the alternative to the two claims of relief set forth above, the Defendants have no claim of jurisdiction over non-Indians for any purpose in areas taken by the United States for the construction of the Oahe reservoirs including the bed and overlying waters of the Missouri River, because such areas are no longer part of the Cheyenne River Sioux Reservation by virtue of Public Law 870-81 (1950), and Public Law 776-83 (1954) and, if necessary, the agreement of 75 percent of the voting members of the Tribe to the latter act.

PRAYER FOR RELIEF

WHEREFORE, the State of South Dakota respectfully requests this Court as follows:

A. To assume immediate jurisdiction over this matter.

B. Issue a declaratory judgment determining:

(1) Defendants have no jurisdiction to arrest and try non-Indians within the boundaries of the Cheyenne River Sioux Tribe for any offense; and

(2) Defendants have no jurisdiction to exclude non-Indians from hunting on fee lands or public lands and waters within or purportedly within the Cheyenne River Sioux Reservation, including the land and water areas taken by the United States for the building of the Oahe Reservoir.

(3) In the alternative to paragraphs (1) and (2) above, that the reservation has been diminished by the federal acts taking lands and overlying waters for the reservoir and, if found to be necessary, by

the tribal members' consent to the federal actions.

C. Issue temporary, preliminary and permanent injunctions prohibiting the Defendants from attempting to take the actions described above.

D. Award Plaintiff its costs and disbursements, herein, including a award of attorney's fees.

E. Award Plaintiff its other and additional alternative relief as may appear just and proper.

Dated this 6th day of January, 1989.

Respectfully submitted,

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ATTORNEY GENERAL
/s/ John P. Guhin
Deputy Attorney General
State Capitol
Pierre, S.D. 57501-5070
Telephone: (605) 773-3215

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

CENTRAL DIVISION

STATE OF SOUTH DAKOTA)	CIV. 88-3049
in its own behalf, and)	
as parens patriae,)	
)	
Plaintiff,)	
)	
v.)	ANSWER TO SECOND
)	AMENDED COMPLAINT
WAYNE DUCHENEAUX,)	
personally and as Chair-)	
man of the Cheyenne)	
River Sioux Tribe and)	
LENETA MINER, personally)	
and as Director of)	
Cheyenne River Sioux)	
Tribe Game, Fish and)	
Parks,)	
)	
Defendants.)	

The Defendants, Wayne Ducheneaux and LeNeta Miner, in both their official and individual capacities, for their Answer to the Second Amended Complaint of the Plaintiff, state as follows:

1. The Defendants assert that the Complaint fails to state a cause of action or claim for relief against the Defendants for

which relief may be granted and, accordingly, the Complaint should be dismissed.

2. The Defendants assert that the Plaintiff has failed to join the Cheyenne River Sioux Tribe in this case and that under Rule 19 the case should be dismissed for failure to join an indispensable party.

3. The Defendants deny each and every allegation of the Complaint except as specifically admitted.

4. The Defendants assert that the first sentence of Paragraph I requires no answer. With respect to the remainder of that paragraph, the Defendants deny that they have engaged in abrupt and illegal actions and further state that they are without knowledge of the reasons for the State's filing of this action.

5. The Defendants deny that this Court has jurisdiction as alleged in Paragraph II.

6. The Defendants deny that there is a cause of action as alleged in Paragraph III.

7. With respect to paragraph IV, the Defendants deny that there is a cause of action in this case and deny that grounds exist for the issuance of an injunction pursuant to Rule 65.

8. The Defendants deny that there is a cause of action as alleged in Paragraph V but do not dispute that if a cause of actions exists, venue would lie in the Central Division.

9. The Defendants admit that the State of South Dakota is one of the states of the federal union but deny that it is entitled to bring this action on behalf of its citizens, parens patriae.

10. The Defendants admit the statements contained in Paragraph VII.

11. The Defendants deny the allegations in the first, second and third sentences of

Paragraph I (facts). The Defendants state that they are without knowledge to admit or deny the fourth and fifth sentences of that Paragraph.

12. The Defendants deny the allegations in the first, second and third sentences of Paragraph II (facts).

13. The Defendants admit the statements in Paragraph III (facts).

14. The Defendants deny the allegations in Paragraph IV (facts).

15. The Defendants deny the allegations in Paragraph V (facts).

16. The Defendants are without sufficient knowledge to admit or deny the allegations in Paragraph VI (facts).

17. The Defendants are without sufficient knowledge to admit or deny the allegations in the first sentence of Paragraph VII (facts). The Defendants deny the allegation in the second sentence of that Paragraph.

18. The Defendants admit the statement in the first sentence of Paragraph VIII (facts). The Defendants are without sufficient knowledge to admit or deny the allegations in the second sentence of that Paragraph. The Defendants deny the allegations in the remainder of that Paragraph.

19. The Defendants deny the allegations in the first sentence of Paragraph IX (facts). The Defendants admit the statements in the second sentence in that Paragraph.

20. The Defendants deny the allegations in Paragraph X (facts).

21. The Defendants deny the allegations in Paragraph XI (facts).

22. The Defendants deny the allegations in Paragraph XII (facts).

23. The Defendants deny the allegations in Paragraph XIII (facts).

24. The Defendants deny the allegations contained in Paragraph XIV (facts).

25. The Defendants deny the allegations and conclusions of law found in Paragraph XV (facts).

26. The Defendants deny that the Complaint sets forth any valid claim for relief.

Affirmative Defenses

27. The Complaint fails to state a cause of action upon which relief can be granted.

28. The State is without standing to commence an action as parens patriae against the Defendants.

29. The Plaintiff's allegations put into controversy the extent of the jurisdiction of the Cheyenne River Sioux Tribe on the lands of its reservation and consequently the Cheyenne River Sioux Tribe is an indispensable party. Because the Tribe is an indispensable party and has not been joined in this controversy this action should be dismissed pursuant to Rule 19(b), Federal Rules of Civil Procedure.

30. The Plaintiff's allegations put into controversy the interests of the United States as trustee for the Cheyenne River Sioux Tribe on the lands within the Reservation of the Cheyenne River Sioux Tribe. Because the United States is an indispensable party and has not been joined in this controversy, this action should be dismissed pursuant to Rule 19(b), Federal Rules of Civil Procedure.

31. The Defendants are officials of the Cheyenne River Sioux Tribe and are immune to suit when acting in their official capacity. Therefore this case should be dismissed.

32. The Defendants have taken no actions in their individual capacities and none of the allegations in the Complaint allege any individual actions by the Defendants. Accordingly, the action must be dismissed against them in their individual capacities.

33. Pursuant to its Constitution and By-Laws the Cheyenne River Sioux Tribe has juris-

diction to regulate hunting and fishing throughout its Reservation, including fee and public lands on the Reservation. The Tribal Constitution and By-Laws are consistent with principles of federal common and statutory law.

WHEREFORE, the Defendants plead that this Court:

1. Dismiss this cause of action with prejudice;

2. Award the Defendants its costs and disbursements in this action including reasonable attorneys' fees and such other and further relief as is just and equitable.

Dated: Feb. 8, 1989

Respectfully submitted,

GREENE, MEYER & MCELROY, P.C.

By: /s/ Scott B. McElroy

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(Certificate of Mailing omitted in printing)

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
CENTRAL DIVISION

DONALD J. PORTER
CHIEF JUDGE
413 U.S. COURTHOUSE
PIERRE, SOUTH DAKOTA 57501

August 21, 1990

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RE: CIVIL NO. 88-3049
STATE OF SOUTH DAKOTA, Plaintiff,
vs.
WAYNE DUCHENEAUX, personally and as
Chairman of the Cheyenne River Sioux
Tribe, and LENITA MINER, personally and
as Director of Cheyenne River Sioux Tribe
Game, Fish and Parks, Defendants.

Dear Counsel:

MEMORANDUM OPINION

This action for declaratory and
injunctive relief was brought by the State of
South Dakota against tribal defendants Wayne
Ducheneaux, chairman of the Cheyenne River
Sioux Tribal Council, and Lenita Miner,
director of the Cheyenne River Sioux Tribe
Game, Fish and Parks. The controversy
involves the extent of tribal hunting and
fishing jurisdiction over nonmembers¹ on lands

¹Following the United States Supreme
Court's recent opinion in Duro v. Reina,
U.S. ___, 110 S. Ct. 2053, 109 L.Ed.2d 693
(1990), a decision on the limits of tribal
civil jurisdiction over non-Indians on certain
reservation lands should also decide the
limits of tribal civil jurisdiction over
nonmembers Indians on those same lands.
(continued...)

within the exterior boundaries of the Cheyenne River Reservation no longer owned by the Cheyenne River Sioux Tribe (Tribe) or any of

¹(...continued)

Justice Kennedy, writing for the majority, aptly summed up the Court's holding:

The question we must answer is whether the sovereignty retained by the tribes in their dependent status within our scheme of government includes the power of criminal jurisdiction over nonmembers.

We think the rationale of our decisions in Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 98 S.Ct. 1011, 55 L.Ed. 2d 209 (1978)] and [(United States v. Wheeler, [435 U.S. 313, 98 S.Ct. 1079, 55 L.Ed. 2d 303 (1978)] as well as subsequent cases, compels the conclusion that Indian tribes lack jurisdiction over persons who are not tribe members.

Duro, 110 S.Ct. at 2059.

Even though the state's complaint seeks a determination of tribal jurisdiction over "non-Indians" without reference to nonmember Indians, Duro effectively eliminates any distinction. Accordingly, throughout this opinion the Court refers to both nonmember Indians and non-Indians as "nonmembers." See Lower Brule Sioux Tribe v. South Dakota, 540 F.Supp. 276, 288 n.14 (D.S.D. 1982), rev'd on other grounds, 711 F.2d 809 (8th Cir. 1983).

its members. These lands either are (1) held in fee by nonmembers or (2) were taken by the United States to construct the Oahe dam and reservoir. As this case concerns tribal rights and powers granted by various treaties and federal statutes, the Court has jurisdiction in this case pursuant to 28 U.S.C. §§ 1331.

After the State and the tribal defendants were unable to reach an agreement for the 1988 deer season for Dewey and Ziebach counties, South Dakota on its own behalf and on behalf of its citizens parens patriae sought the following relief:

WHEREFORE, the State of South Dakota respectfully requests this Court as follows:

A. To assume immediate jurisdiction over this matter.

B. Issue a declaratory judgment determining:

(1) Defendants have no jurisdiction to arrest and try non-Indians within the boundaries of the Cheyenne River Sioux Tribe [sic] for any offense; and

(2) Defendants have no jurisdiction to exclude non-Indians from hunting on fee lands or public lands and waters within or purportedly within the Cheyenne River Sioux Reservation, including land and water areas taken by the United States for the building of the Oahe Reservoir.

(3) In the alternative to paragraphs (1) and (2) above, that the reservation has been diminished by the federal acts taking lands and overlying waters for the reservoir and, if found to be necessary, by the tribal members' consent to the federal actions.

* * *

Plaintiff's Second Amended Complaint, p. 9
(February 6, 1989).

South Dakota contends that Congress intended to disestablish the reservation boundaries when the subject lands were taken out of trust status and conveyed either to nonmembers or the United States. In the alternative, the State argues that treaty rights conferring regulatory authority upon the Tribe over hunting and fishing by nonmembers have been abrogated and that

inherent Indian sovereignty does not necessitate tribal civil jurisdiction over this matter. Finally, the State interprets the tribal defendants' admonition as threatening impermissible criminal prosecution if sportsmen fail to comply with tribal licensing regulations. Thus, even if the Tribe has jurisdiction over nonmembers, the State argues that the defendants would exercise tribal jurisdiction in a manner proscribed by law.

The tribal defendants point to past cases which have held that no disestablishment of the reservation boundaries occurred. In addition, they argue that those acts of Congress which allowed the transfer of tribally-owned lands to nonmembers or the federal government reserved tribal jurisdiction over all persons hunting and fishing on those lands. The defendants also assert that, because tribal civil jurisdiction

derives from rights and powers inherent in the Tribe as a sovereign government, they have the authority to enforce tribal licensing regulations against nonmembers because the Tribe has always retained power over all hunting and fishing within the reservation. Finally, the tribal defendants deny that they would impose criminal sanctions against nonmember violators as the Cheyenne River Sioux Tribal Court has held that it may impose only civil sanctions against nonmembers.

Having considered carefully the contentions of all involved, the Court finds that, while the lands removed from trust status did not disestablish the reservation boundaries, the Tribe nonetheless has no civil jurisdiction over the hunting and fishing activities of nonmembers on those lands. The tribal defendants, therefore, are permanently enjoined from area or fee lands and from

imposing tribal game licensing regulations upon them.

BACKGROUND

I

The Cheyenne River Reservation lies wholly within Dewey and Ziebach counties in north-central South Dakota, bordered on the east by the Missouri River. Early in the fall of 1988, representatives of the South Dakota Department of Game, Fish and Parks submitted a proposed agreement for the 1988 Dewey-Ziebach deer hunting season to the Tribe. The State later submitted a second proposed agreement after negotiations with the Tribe. During these negotiations, tribal representatives expressed concern that the proposal did not adequately protect the grazing permit rights of tribal members on a strip of land adjacent to the Missouri River called the "taken area." The Tribe sought to include a provision requiring that any nonmember wishing to hunt

on the taken area must first secure tribal permission. The State refused to grant this concession.

The State filed its complaint after tribal representatives issued this announcement to the local media:

DUE TO THE STATE OF SOUTH DAKOTA'S INTRANSIGENCE, ALL HUNTERS MUST NOW HOLD A CHEYENNE RIVER SIOUX TRIBAL HUNTING LICENSE TO HUNT ON ANY AND ALL LANDS WITHIN THE EXTERIOR BOUNDARIES OF THE RESERVATION. THE STATE LICENSES WILL NO LONGER BE HONORED AND VIOLATORS ARE SUBJECT TO PROSECUTION IN TRIBAL COURT.

The tribal defendants initially sought to dismiss the complaint. The Court, by order and accompanying memorandum opinion filed July 3, 1989, denied the motion. Although the parties addressed the issue whether the sanctions threatened by the tribal defendants against nonmember violators were criminal in nature, the Court focused on whether the United States and the Tribe itself were indispensable parties who could not be sued

under the doctrine of sovereign immunity. Guided by Fed.R.Civ.P. 19, this Court concluded that, notwithstanding that sovereign immunity prohibited maintaining the action against either the United States or the Tribe itself, the United States and the Tribe were not indispensable parties to the lawsuit.² The Court adheres to its earlier ruling.

II

The treaty of April 29, 1868, 15 Stat. 635 (1868) (hereafter 1868 Fort Laramie Treaty) established the boundaries of the Great Sioux Nation. Out of this vast territory, Congress later set aside for the

²This Court noted (1) that the interests of the United States would not be impaired and that equity and good conscience warranted continued litigation; and (2) that the complaint targeted conduct of the tribal defendants as outside the scope of their authority. Dismissal for failure to join the Tribe was improper because the question whether the tribal defendants were acting beyond their authority was the precise question to be addressed at the trial on the permanent injunction motion.

Tribe what is now the Cheyenne River Reservation. Act of March 2, 1889, 25 Stat. 889 (1889) (hereafter Act of 1889).

Not all the land within the reservation is owned by the Tribe, its members or held in trust by the United States on their behalf.³ This relinquishment of title resulted from various federal programs which either encouraged nonmember settlement or furthered national public projects. Today, the reservation consists of approximately 2,806,914 acres of which slightly less than half are held in trust for the Tribe. About 1,411,000 acres of non-trust land passed out of trust status as a result of acts of Congress.

³Trust lands are lands allotted to individual Indians and held by the United States in trust for them, see Burke Act of 1906, 34 Stat. 132 (codified at 25 U.S.C. § 349), or held by the United States for the benefit of the Tribe itself.

The Act of 1889 allotted to individual Indians parcels of land with title in the United States in trust for the allottee for twenty-five years. Following the issuance of fee patents by the Secretary of the Interior of Indian allottees, many of these allotted lands were acquired by nonmembers of the Tribe through sale or inheritance. A large amount of unallotted land considered by Congress to be surplus land was later taken out of trust status as a result of the Act of May 29, 1908, 35 Stat. 460 (1908) (hereafter Act of 1908). This Act allowed nonmembers to hold and the property and claim fee title to lands lying within the reservation boundaries. The Acts of 1889 and 1908 took approximately 1,307,000 acres of reservation land out of trust status.

Congress also acquired certain trust lands for flood control on the Missouri River. The Oahe reservoir was built pursuant to the Flood Control Act of 1944, 58 Stat. 886

(hereafter Flood Control Act). The United States Supreme Court traced the history of the Flood Control Act in ETSI Pipeline Project v. Missouri, 484 U.S. 495, 108 S. Ct. 805, 98 L.Ed.2d 898 (1988), and noted that it was conceived to remedy two distinct water problems on the Missouri River Basin watershed. South Dakota, like other states in the upper Basin region, experienced difficulties in developing Missouri River water for agricultural and industrial purposes, while states in the lower Basin region experienced seasonal skirmishes with flood control and navigation. Id. at 499.

The Flood Control Act was a compromise between proponents of two comprehensive plans for the project -- the Pick Plan and the Sloan Plan. Among other things, the compromise plan provided for six main-stem reservoirs on the Missouri River. The largest of these, the Oahe Dam and Reservoir Project, would enable

"the irrigation of 750,000 acres of land in the James River Basin as well as . . . provide useful storage for flood control, navigation, the development of Hydroelectric power, and other purposes.'" Id. at 502 (citing S. Doc. No. 247, 78th Cong., 2d Sess., 3 (1944)). Building the Oahe dam and reservoir required the Cheyenne River Tribe to relinquish 104,420 acres of valuable bottomland--"the greatest acreage given up by any tribe to facilitate the construction of a main stem dam on the Missouri River in South Dakota" Herbert T. Hoover, Professor--Department of History, University of South Dakota, "Cheyenne River Sioux Tribe: Taking Area History," p.1 (Exhibit 93).

III

In the case at bar, the parties filed pre- and post-trial memoranda on the issues to be addressed by the Court. The Court also heard from the United States amicus curiae. A

six-day bench trial ensued wherein the Court heard the testimony of twenty witnesses and received in evidence 267 exhibits. In addition to the factual and procedural background as set forth above, the Court makes the following specific factual findings:

1. About 1,395,729 acres, or 46.5 percent, of the Cheyenne River Reservation is deeded in fee to members and nonmembers. Approximately 3.7 percent of the reservation consists of lands taken by the United States for use by the Oahe Dam and Reservoir Project. The remaining 49.8 percent of the reservation is held in trust with 442,944 acres consisting of individual allotments which remain in trust and 952,782 acres comprising tribal trust lands. The Court makes no finding as to the percentage breakdown of member and nonmember ownership of the deeded lands.

2. The trust lands are interspersed throughout the reservation but are more

densely located along the taken area. About two-thirds of the trust lands border the Missouri and Cheyenne Rivers on the eastern and southern boundaries of the reservation.

3. Of the 1980 population of 7,636 persons within Dewey and Ziebach counties, Indians constituted 58 percent and whites constituted 42 percent of that total. 1990 statistics are not yet available nor is there any breakdown as to the population percentages of members and nonmembers on the Cheyenne River Reservation.

4. The Tribe has always asserted jurisdiction over all hunting and fishing activities on the reservation, including nonmember fee lands and the taken area.

5. The Tribe has not acquiesced to any State assertion of jurisdiction over hunting and fishing activities on the reservation. Beginning with the passage of the Indian Reorganization Act of 1934, 48 Stat. 984, the

Tribe enacted ordinances, promulgated under the authority of Article VII of the Tribal By-Laws and approved by the Bureau of Indian Affairs (BIA), which required nonmembers to obtain a tribal permit to hunt or fish on the reservation.

6. Prior to this lawsuit, both the Tribe and the State enforced their respective game and fish regulations on the lands in dispute. The Tribe enforced its regulations against all violators while the State limited its enforcement efforts to nonmembers.

7. No evidence was presented that the Cheyenne River Sioux Tribal Court has imposed criminal sanctions upon a nonmember who violated the tribal game ordinances.

8. The Tribe has the right to graze stock on the taken area subject to the corresponding use by the United States Army Corps of Engineers.

9. The Tribe exercises its grazing rights according to the terms of its tribal grazing code. This code, approved by the BIA, allows the Tribe to allocate range units to permittees with the grazing permit issued by the BIA. See 25 C.F.R. part 166 (1989). The grazing unit permittee leases only the grass and cannot refuse to allow a tribal member access to the taking area land for reasonable hunting or fishing purposes, though tribal members are encouraged to inform the permittee beforehand of their intended activity. All of the taking area lands within the reservation have been leased.

10. Hunting and fishing for subsistence purposes by members of the Cheyenne River Tribe is an important cultural, social, and religious activity. Lakota tradition exhorts able-bodied tribal members to care for the needy, weak, and elderly. Not only does subsistence hunting and fishing further that

tradition, it honors a fundamental Lakota philosophy of courage, wisdom, and generosity. Hunting and fishing also were necessary to the survival of the early American Indians.

11. Despite the importance to tribal members of hunting and fishing for subsistence purposes, it does not appear that subsistence hunting and fishing is widely practiced by present Cheyenne River Sioux Indians.

12. Tribal regulation of nonmember hunting on the taken area and nonmember fee lands is not necessary to protect hunting by tribal members for subsistence purposes. Deer harvested by nonmember hunters on the taken area and the nonmember fee lands does reduce the amount of deer available to tribal members. This reduction, however, does not decrease subsistence hunting by members as few deer are harvested by members for subsistence purposes.

13. The State has established that the Tribe itself, in setting licensing fees and season

limits, places greater management emphasis on recreation hunting than on subsistence hunting. The tribal wildlife management program does not monitor subsistence hunting nor has the Tribe ever closed a season with the stated purpose of assuring adequate subsistence hunting as opposed to assuring adequate recreational hunting by tribal members.

14. Only a small amount of hunting by tribal members is conducted for subsistence purposes, therefore, hunting activities of nonmembers on the taken area and fee lands would not make it more difficult for tribal members to successfully subsistence hunt on the reservation.

15. The past subsistence needs of tribal members have been met despite nonmember hunting on the taken area and fee lands. Indeed, often more big game and small game tribal licenses were sold to nonmembers than

to members. Thus, the taken area and fee lands are not substantial food sources for tribal members.

16. Tribal regulation of nonmember fishing on the shoreline of the taken area is not necessary to protect fishing by tribal members for subsistence purposes. The State proved that subsistence fishing by members on the taken area is not a substantial source of food for tribal members.

17. Tribal lands contribute to the well-being of the deer herds on the taking area and on nonmember fee lands. Virtually all the land adjacent to the taking area is trust land. As a white tail deer may move up to twelve miles across its home range, all reservations lands, whether trust, deeded or public, sustain deer populations. An effective state or tribal wildlife management program necessarily must encompass the entire reservation.

18. Generally nonmembers hunting and fishing on the reservation have conducted themselves in a manner that does not threaten the legitimate tribal concerns for livestock grazing and protection of other property. Although nonmembers may have harassed cattle grazing on the taken area or on tribal lands, failed to close pasture gates, or let down wires on fences, this conduct has not been so extreme and pervasive as to warrant extraordinary enforcement efforts by state or tribal game officers. Hunting and fishing by members on these lands has resulted in many of the same unlawful or improper acts towards the personal property of landowners and grazing permittees.

19. Federal agencies like the BIA, the U.S. Fish & Wildlife Service, and the U.S. Army Corps of Engineers cooperate with state and tribal governments in promoting fish and wildlife conservation and public recreation.

For example, federal funds are made available through the Dingell-Johnson Act, 16 U.S.C. § 777 (1989), the Endangered Species Act, 16 U.S.C. § 1531, and the Indian Self-Determination and Education Assistance Act, Pub. L. No. 93-638, 88 Stat. 2203 (codified at 25 U.S.C. §§ 450 et seq. (1975) (hereafter Indian Self-Determination Act). South Dakota, through its Pheasants for Everyone program, complements the Conservation Reserve Program, 7 C.F.R. part 704 (1990), of the Agricultural Stabilization and Conservation Service by contracting with farmers to grow wildlife food plots on idled CRP land.

20. Neither the State nor the Tribe can lay claim to a program of wildlife management without crediting federal agencies with some financial and management assistance. Moreover, federal assistance is not an intimation of regulatory jurisdiction.

21. The economic security of the Cheyenne River Tribe would not be threatened if prohibited from regulating the hunting and fishing activities of nonmembers on the deeded lands and taken area. Although the Tribe has regulated nonmember sportsmen on the reservation, it has not been successful in developing a recreational hunting and fishing industry that would generate revenues to defray the cost of a large-scale management program. Preservation and development of tribal resources is carried out primarily by enforcement of tribal regulations.

22. In the 1930's and the 1940's the Tribe had made significant inroads into wildlife management. Notwithstanding its earlier success, inadequate funding has prevented the tribe from sustaining an independent and vigorous scheme of wildlife management on the reservation. Certain management activities of the Tribe, like fish stocking and exchange

programs, have been limited and little documentation exists since 1984.

23. Until 1989, no ongoing fish or wildlife surveys for the collection of harvest and population data were conducted by the tribal game, fish and parks department. Also, the Tribe had no established conservation, depredation, or stocking programs to protect and enhance existing fish and wildlife resources.

24. A single wildlife biologist employed by the Aberdeen-area BIA was available to advise and assist the tribe. This biologist also serves fourteen other reservations in three states, all under the administration of the Aberdeen-area BIA office. Except for the BIA wildlife biologist, tribal conservation personnel have little or no background in biology or wildlife management. For example, training courses in wildlife management for tribal game wardens were virtually nonexistent

before 1989. As a result, the tribal council has had to rely upon estimates and recommendations of state game officials in setting bag and season limits.

25. In 1989, the Tribe contracted for wildlife biologist and management consultant services with Lower Brule Wildlife Enterprise. Funding for assistance in developing a wildlife management program was requested by the Tribe prior to November 1988 and later was provided by the Department of the Interior pursuant to a P.L. 638 contract with the Tribe.

26. The tribal wildlife management program written by the contract biologist service employs scientific data collection and management techniques. The reservation-wide program seeks to maximize annual harvestable surpluses to meet the present and future economic, recreational, and aesthetic needs of tribal members. No data compilations or

reports are available yet to gauge the program's strengths and weaknesses, nor is there any evidence as to the successful implementation of the new wildlife management plan.

27. After the needs of tribal members have been met, the tribal wildlife program provides for consumptive and non-consumptive opportunities for others.

28. The Tribe has been unsuccessful in developing the Oahe fishery. Little revenue is raised by the sale of fishing licenses to nonmembers and other fishing-related development, i.e., campgrounds, resorts, tourist attractions, bait shops and novelty items, is virtually nonexistent.

29. The State of South Dakota implemented a comprehensive wildlife regulatory program in the early years of its statehood. The function and structure of the South Dakota Department of Game, Fish and Parks has

expanded to serve changing public and environmental demands since that time.

30. Recreational hunting generates revenues sufficient to justify substantial expenditures for South Dakota's wildlife management program.

31. The State has a large staff of highly educated and experienced wildlife conservation personnel. The wildlife surveys for the area are comprehensive scientific tools for monitoring harvest and population data. State programs for habitat improvement, depredation control, and wildlife conservation, including pervasive law enforcement measures and field-level recommendations by conservation officers, have been successful in promoting manageable wildlife populations in Dewey and Ziebach counties.

32. Fisheries management is an integral part of the State's general recreation plan. Lake Oahe boasts of a spawning and imprint station

above the dam in the Whitlock reservoir. Walleye and northern pike fishing in the Lake Oahe area are recognized as among the best in the nation. South Dakota stocked the Oahe area with approximately 72 million fish during the period from 1970 to 1988, including a wide array of sport fishing species like rainbow trout, smallmouth bass, walleye, and chinook salmon. Fish stocking studies monitor the success of a particular stocking effort. The State conducts fish population surveys for use in determining its fishing regulations as well as studies to determine fishing pressure, catch rates and harvest information on the lakes on the Missouri River. Numerous other studies and surveys monitor particular aspects of fisheries management on Lake Oahe. In addition, the State submits annual Missouri River water level recommendations to the Corps of Engineers with the goal of improving recreational fishing and protecting endangered

species. Enforcement of fishing regulations also furthers fisheries management. Finally, South Dakota invests a substantial sum of money, along with joint funding from various federal programs, in developing its recreational fishery on Lake Oahe. In return for its investment, the State generates substantial revenue through the sale of licenses and through enhanced tourism.

33. Neither the taken area nor the fee lands constitute a pristine area. The Tribe has never denied general nonmember access to the taking area or fee lands nor does the Tribe monitor nonmember access to the taken area or fee lands. In addition, there has been no showing by the Tribe that unique cultural, spiritual, or religious significance attaches to the taken area or the fee lands.

34. The Tribe has no general scheme to define the essential character of the reservation lands. Nonmember fee lands are interspersed

throughout the reservation in a checkerboard fashion. The reservation consists primarily of range and farm land. There is little industrial development and only a few sparsely populated communities.

35. The Tribe discriminates against nonmembers in the application of its hunting and fishing programs. Discrimination in setting season limits is most obvious in the deer seasons with restrictions upon nonmembers regarding season closings and deer type, sex and age that are not applicable to member hunters.

36. The tribal game, fish and parks department sets licensing fees and season limits without regard to member subsistence hunting and in a manner which discriminates against nonmembers. The discriminatory licensing fees apply to nearly every animal hunted or trapped on the reservation. These

restrictions apply whether the lands being hunted are trust, deeded or public lands.

37. The State hunting program, on the other hand, does not discriminate against Indian or nonmember hunters in setting fees and season limits. In addition, state conservation programs, like the Pheasants for Everyone program and the predator program, encourage participation by both members and nonmembers.

38. The State does not discriminate against members or nonmembers fishing on the Missouri River. State fish stocking efforts include rivers that run through the reservation.

39. The Cheyenne River Tribe's political integrity will not be diminished as it still retains exclusive regulatory jurisdiction over the trust land and regulatory jurisdiction over its members throughout the reservation.

40. In sum, the Tribe need not regulate the hunting and fishing activities of nonmembers on the taken area and the nonmember fee lands

to protect its political integrity, economic security, or health or welfare.

ISSUES

The following issues are presented by the record in this case:

- I. Did the Tribe threaten impermissible criminal sanctions against those nonmembers who violate the tribal licensing regulations?
- II. Were the Cheyenne River Reservation boundaries disestablished as a result of the Act of 1908 and the Cheyenne River Act?
- III. Does the Tribe have civil jurisdiction to regulate hunting and fishing by nonmembers on the taken area and nonmember fee lands?

DISCUSSION OF ARGUMENTS AND AUTHORITIES

I

The Court first turns to the question whether enforcement of the tribal game

ordinance would include the imposition of criminal sanctions against nonmembers. A tribe's criminal jurisdiction over its members is "part of retained tribal sovereignty, not a delegation of authority from the Federal Government." Duro v. Reina, 110 S. Ct. at 2060; see also United States v. Wheeler, 435 U.S. 313, 323, 98 S. Ct. 1079, 55 L. Ed. 2d 303 (1978). The opposite is true in relations with nonmembers, though, because tribes lack the power to prescribe and enforce rules of conduct against nonmembers through criminal sanctions. As sovereigns dependent upon the dominant political will of the federal government, "Indian tribes . . . necessarily give up their power to try nonmember citizens of the United States except in a manner acceptable to Congress." See Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 210, 98 S. Ct. 1011, 55 L. Ed. 2d 209 (1978). Thus Congress must affirmatively delegate to a

tribe criminal jurisdiction over nonmembers.

Id. Inasmuch as Congress created federal criminal jurisdiction over offenses committed by nonmembers in Indian country, which includes all land within the limits of the reservation, no grant of criminal authority over nonmembers exists in the tribes. 18 U.S.C. §§ 1151 et seq. Indian tribes must look to Congress or the states for prosecution of crimes committed by nonmembers upon Indian lands. See Duro, 110 S. Ct. at 2057 n.1; Public Law 280, Act of Aug. 15, 1953, 67 Stat. 588 (codified as amended at 18 U.S.C. § 1162, 25 U.S.C. §§ 1321-1326, 28 U.S.C. § 1360) (hereafter P.L. 280).

In this action South Dakota seeks to prohibit the tribal defendants from asserting criminal jurisdiction over nonmembers who are in violation of tribal licensing regulations. This Court previously declined to dismiss this count of the complaint on the grounds that its

disposition should await the parties' factual presentation. Having reviewed the briefs on the motion for dismissal and having heard the testimony at trial, this Court concludes that the State's first count must be dismissed for lack of a justiciable case or controversy under Article III of the U.S. Constitution.

Throughout this litigation the tribal defendants have disavowed any criminal jurisdiction over nonmembers, claiming that the available sanctions are purely civil in nature. The State, on the other hand, asserts that tribal enforcement of its hunting and fishing code will be accomplished through impermissible criminal sanctions. However that may be, this Court cannot speculate as to whether tribal enforcement of its game ordinances will be accomplished through civil or criminal sanctions when no actual conflict has been presented by the State.

The tribal defendants raise the specter of National Farmers Union Ins. Co. v. Crow Tribe of Indians, 471 U.S. 845, 105 S. Ct. 2447, 85 L. Ed. 2d 818 (1985), for the proposition that scrutiny of the enforcement provisions of the game ordinance rests initially with the tribal court. Indeed, National Farmers supports this position, saying:

. . . [T]he existence and extent of a tribal court's jurisdiction will require will require a careful examination of tribal sovereignty

* * *

We believe that examination should be conducted in the first instance in the Tribal Court itself. Our cases have often recognized that Congress is committed to a policy of supporting tribal self-government and self-determination. That policy favors a rule that will provide the forum whose jurisdiction is being challenged the first opportunity to evaluate the factual and legal bases for the challenge.

Id. at 856.

According to the evidence presented at trial, the Cheyenne River Sioux Tribe Court has never imposed criminal sanctions upon nonmember transgressors. Moreover, a recent decision of the Tribal Court unequivocally limits tribal enforcement over nonmember hunting and fishing activities on the reservation "by means of civil ordinances and laws" Cheyenne River Sioux Tribe v. Key, slip op. at 4 (Cheyenne River Sioux Tribal Court filed Jan. 31, 1990). Without commenting on the source of authority upon which the Tribal Court relies in reaching its conclusion, the decision ultimately restricts tribal sanctions against nonmembers to those generally recognized as civil in nature.

The tribal enforcement provisions do not establish a brightline between the available civil and criminal penalties. But, until this Court is called upon to determine whether an actual judgment of the Tribal Court exacts a

criminal rather than a civil penalty against a nonmember violator of the tribal game ordinance, this purported controversy lacks "sufficient immediacy and reality." Granville House, Inc. v. Department of H.E.W., 772 F.2d 451, 455 (8th Cir. 1985), appeal after remand, 796 F.2d 1046 (1986), vacated, 813 F.2d 881 (1987). See also, Rincon Band of Mission Indians v. County of San Diego, 495 F.2d 1, 6 (9th Cir. 1974); Hodel v. Irving, 481 U.S. 704, 107 S. Ct. 2076, 95 L. Ed. 2d 668 (1987). Dismissal of the State's first prayer for relief therefore is warranted at this time.

II

The second issue to be addressed by the Court is whether Congress has altered the reservation boundaries thereby depriving the Tribe of jurisdiction over nonmember activities on the disestablished lands. Subject to certain limitations, a tribe can

exercise civil regulatory authority over conduct that takes place only on its reservation. If Congress has disestablished the reservation boundaries and has not reserved tribal regulatory authority, the tribe has no jurisdiction over Indian or nonmember activities on the disestablished portion. But, if no disestablishment has occurred, "treaty-established jurisdiction would preempt the application of state . . . laws on the reservation, . . . except to the extent that the Tribe's rights have been abrogated by subsequent congressional action." Lower Brule Sioux Tribe v. South Dakota, 711 F.2d 809, 815 (8th Cir. 1983), cert. denied, 464 U.S. 1042, 104 S. Ct. 707, 79 L. Ed. 2d 171 (1984) (citing Rosebud Sioux Tribe v. Kneip, 430 U.S. 584, 97 S. Ct. 1361, 51 L. Ed. 2d 660 (1977); DeCoteau v. District County Court, 420 U.S. 425, 95 S. Ct. 1082, 43 L. Ed. 2d 300 (1975)).

Other courts, including the United States Supreme Court, frequently have addressed disestablishment questions of this nature. An intention to disestablish reservation boundaries is not lightly imputed to Congress. Instead, Congress must affirmatively alter established reservation boundaries in unmistakable terms. See Rosebud Sioux Tribe v. Kneip, 430 U.S. at 586; DeCoteau v. District County Court, 420 U.S. 444; Lower Brule Sioux Tribe v. South Dakota, 711 F.2d at 815-16. The "face of the Act" or "the surrounding circumstances and legislative history" must be examined to divine Congress' intent. Mattz v. Arnett, 412 U.S. 481, 505, 93 S. Ct. 2245, 37 L. Ed. 2d 92 (1973). Finally, "traditional solicitude for the Indian tribes" directs that any legislative ambiguity or doubtful expressions of disestablishment must be resolved in their

favor. See Solem v. Bartlett, 465 U.S. 463, 472, 104 S. Ct. 1161, 79 L. Ed. 2d 443 (1984).

A

The United States Supreme Court held in Solem v. Bartlett, supra, that the Act of 1908, which opened to settlement 1.6 million acres of surplus or unallotted lands in the Cheyenne River Reservation, did not affect the original reservation boundaries established by the Act of 1889. Bartlett, 465 U.S. at 481. See also United States v. Dupris, 612 F.2d 319 (8th Cir. 1979), vacated and remanded on other grounds, 446 U.S. 980, 100 S. Ct. 2959, 64 L. Ed. 2d 836 (1980); United States v. Long Elk, 565 F.2d 1032 (8th Cir. 1977); and United States ex rel. Condon v. Erickson, 478 F.2d 684 (8th Cir. 1973). The Bartlett Court held that Congress did not expressly state that the allotment would result in a disestablishment of the original boundaries and that neither the legislative history nor

any later congressional action clearly indicates such a disestablishment. Bartlett, 465 U.S. at 481. Because reservation lands owned in fee by nonmembers passed to them directly or indirectly as a result of the Act of 1908, the Tribe may have civil jurisdiction on the deeded lands within the originally-established boundaries.

B

Moreover, there is no "substantial and compelling evidence of a congressional intent to disestablish Indian lands" taken as a result of the Act of September 3, 1954, Pub. L. No. 83-776, 68 Stat. 1191 (hereafter Cheyenne River Act). See Bartlett, 465 U.S. at 472. On this issue, the Court finds instructive the Eighth Circuit Court of Appeals' opinion in Lower Brule Sioux Tribe v. South Dakota, supra. An examination of the takings accomplished by the Big Bend Act, Pub. L. No. 87-734, 76 Stat. 698 (1962), and the

Fort Randall Act, Pub. L. No. 85-923, 72 Stat. 1773 (1958) [sister Acts to the Cheyenne River Act], led the appeals court to conclude that no disestablishment of the Lower Brule Indian Reservation had occurred. See Lower Brule, 711 F.2d at 821.

Like the Big Bend and Fort Randall Acts, the Cheyenne River Act was one of seven taking statutes enacted to compensate the tribes and their members for Flood Control Project lands taken by the Corps of Engineers. Id. at 813 n.1 (citations to Acts). Lower Brule held that despite Congress' use of the words "as diminished" in four of the taking statutes when referring to the reservation -- including the Cheyenne River Act -- no congressional intent to disestablish was found in the Big Bend and Fort Randall Acts. Lower Brule attributed the different wording found in the statutes to diverse formats and drafting styles rather than evidence of a variation in

congressional intent. Id. at 821 n.13. Significantly on this point, the Eighth Circuit stated:

. . . the district court's conflicting conclusions on the disestablishment question with regard to the Fort Randall and Big Bend Acts imputes to Congress a very impractical and unlikely purpose with respect to flood control on the Missouri River. If the court below was correct, it would mean that in acquiring the land necessary for the comprehensive Missouri River Basin Project through the seven taking statutes . . . Congress in the first Act . . . and the last two Acts . . . preserved existing reservation boundaries, but in the middle four Acts . . . by inclusion of the words "as diminished," it did not do so. There simply is no indication that Congress intended to create such an unusual and impractical result.

Id. at 820-21.

South Dakota nevertheless asserts that the Cheyenne River Act expressly disestablished the reservation. In relevant part, § 11 of the Cheyenne River Act states as follows:

. . . The lands so selected and purchased as substitute allotments may be either within the boundaries of the Cheyenne River Reservation as diminished by this agreement or outside said reservation as may meet the desires of the individuals involved in the several transactions.

68 Stat. 1191, § 11 (emphasis supplied).

Conceded that in the light of Solem and Lower Brule this statement by itself does not satisfy the "unmistakable terms" requirement for a disestablishment, the State contends that other provisions of the Cheyenne River Act in combination with the above-quoted sentence lead to a conclusion that Congress clearly intended a disestablishment of the reservation. Notably, § 1 of the Cheyenne River Act provides that the Tribe:

. . . does hereby convey to the United States all tribal, allotted, assigned, and inherited lands or interests within said Cheyenne River Reservation belonging to the Indians of said reservation

68 Stat. 1191, § 1.

According to the State, the Tribe's transfer of all title and interest in the project lands to the federal government worked a disestablishment of the reservation along the taken line of the Missouri River. South Dakota's interpretation of § 1, however, is incompatible with later sections of the Cheyenne River Act which expressly reserve in the Tribe specific rights and interests in the taken lands. For example, § 6 provides for the Tribe's retention of mineral rights in the taking area. Section 7 reserved the right to cut and remove timber from the taken area. Finally, § 10 provides that tribal members shall have grazing rights in the taking area and "the right of free access to the shoreline of the reservoir, including the right to hunt and fish in and on the aforesaid shoreline and reservoir[.]" In sum, a conveyance to the United States of all of the Tribe's interests in the project lands is not a clear expression

of disestablishment of the reservation boundaries when followed by a litany of reserved rights and privileges.

Moreover, § 2 of the Cheyenne River Act provides for a sum certain to be paid to the Tribe, "in final and complete settlement of all claims, rights, and demands of said Tribe or allottees[.]" 68 Stat. 1191, § 2. The Eighth Circuit twice has ruled that a nearly identical provision fell short of a clear expression to alter a reservation's boundaries. See Lower Brule, 711 F.2d at 816-17, 819; United States v. Wounded Knee, 596 F.2d 790 (8th Cir.), cert. denied, 442 U.S. 921, 99 S. Ct. 2847, 61 L. Ed. 2d 289 (1979). With little discussion, the Appeals Court concluded that "[t]his language falls short of that utilized by Congress when it has unequivocally expressed its intent to disestablish a reservation's boundaries." Such brevity is compelling and, in this case,

correct. Far from a clear expression of intention to disestablish reservation boundaries, the face of the Cheyenne River Act is ambiguous, and at best equivocal, on this subject.

The Act's legislative history does not evince a congressional intention to alter reservation boundaries. The "as diminished" language of § 11 received identical treatment by the Senate and House Committees on Interior and Insular Affairs. The report of the House Committee provided simply that the "lands so purchased as substitute allotments may be either within or without the boundaries of the Cheyenne River Reservation", entirely omitting the "as diminished" language of the bill. H.R. Rep. No. 2484. 83d Cong., 2d Sess. 8. A report of the Department of the Army, which was included in the Committee Report, did not even discuss § 11. Id. at 9-12. The attached report of the Secretary of the Interior,

however, included the "as diminished" phrase when it recommended that substitute allotments be conveyed in "restricted fee" to the individual Indians. Id. at 14. Yet that report does not elaborate on the disestablishment of reservation boundaries.

In the Senate, the report of the Committee on Interior and Insular Affairs also omitted the "as diminished" language of § 11 in its sectional analysis of the bill. See S. Rep. No. 2489, 83d Cong., 2d Sess. 5. And the reports of the Secretary of the Interior and the Department of the Army run true to form with their reports to the House Committee. Id. at 8, 9-12. Significantly, though, all the committee reports do not elaborate on the effect of the Cheyenne River Act upon the reservation boundaries. In sum, the legislative history of the Cheyenne River Act reflects little, if any, treatment of the disestablishment question.

Finally, circumstances surrounding the taking of the reservation lands do not support a finding of disestablishment. Before it could be effective, § 1 of the Cheyenne River Act, included at the behest of the Tribe, required strict observance of Article 12 of the Treaty of April 29, 1868. Article 12 requires a three-fourths vote of approval by tribal members before any cession of reservation lands can be valid and enforceable against them. The following excerpt from a Memorial presented by the Tribe to Congress, conveyed its concerns if the Cheyenne River Act was not ratified by the required number of votes:

If we should now abandon our insistence that three-quarters of the adults ratify the Act which results from the Oahe bills, we would be abandoning our own Treaty. We would be consenting to a violation of Article XII of that Treaty. It would be a shameful thing for us, as one of the divisions of the Sioux Nation, to abandon and break Article XII of the

1868 Treaty. We have for so many years insisted and still are insisting that the 1868 Treaty and Article XII thereof govern our land claim. From our side we do not wish to be branded as traitors by the people of the Reservations who live by and under the Treaty of 1868.

But what about the Government of the United States? Does the Department of the Interior wish to have conveyed part of the title or a questionable title or an invalid title? Does the Interior Department wish to lay the basis for future litigation? . . .

Memorial to the 83rd Congress in regard to Oahe Project South Dakota, S. 695 and H.R. 2233, presented by the Negotiating Committee of the Cheyenne River Sioux Tribal Council, 3-4 (May 20, 1954) (see Hearing before the Joint Senate-House Committee on Interior and Insular Affairs, S. Doc. No. 695, H.R. Doc. No. 2233, 83rd Cong., 2d Sess. 215 (May 20, 1954)) (hereafter Tribal Memorial). Congress acquiesced and the Cheyenne River Act was later approved by 92 percent of the voting tribal members.

The Tribal Memorial points to a desire on the part of the Tribe to finally and completely convey to the United States those lands required for the Oahe Reservoir. The tribal vote does not, however, express unmistakably a desire to alter existing reservation boundaries. The fact that the Tribe voted to convey limited title to lands necessary for the federal project does not positively denote a relinquishment of tribal jurisdiction over those lands. "Congressional action removing certain reservation land from Indian ownership does not necessarily disestablish reservation boundaries." Lower Brule, 711 F.2d at 815. A change in reservation boundaries, therefore, is not imperative to diminishing the land size of a reservation. See Condon v. Erickson, 478 F.2d at 688.

In its discussion of § 11, the Tribal Memorial makes clear that the Tribe did not

contemplate the disestablishment of reservation boundaries as a result of the takings. The Tribe understood that the Interior Department was "endeavoring to terminate the trust status of a very large body of land" within the reservation. Tribal Memorial at 24. The Tribe's only concern was with the continued trust status of substitute allotments and not with the possible disestablishment of its reservation boundaries. Ostensibly, then, the disestablishment issue did not even command the attention of the Tribe itself, which says something of its prominence in the formation of the Oahe bills to be voted upon.

The Cheyenne River - Act did not disestablish the Missouri River boundary of the Cheyenne River Reservation. The face of the Act itself is not "'precisely suited' to evince Congress' intent to disestablish reservation boundaries." Lower Brule, 711

F.2d at 816. Nor do the legislative history of the Act and the circumstances surrounding its passage and implementation point unmistakably to the conclusion that Congress intended to exclude the taking area from the Cheyenne River Reservation. Id. at 815.

III

The last issue to be resolved is whether the Tribe has the authority to regulate hunting and fishing by nonmembers on lands owned by nonmembers or the United States but which lie within the boundaries of the reservation. The following discussion of general Indian law principles leads this Court to conclude that tribal civil jurisdiction does not reach the hunting and fishing activities of nonmembers on the fee lands or taken area.

A tribe's powers in relations between it and its members upon its territory are akin to those of a sovereign nation. See United

States v. Wheeler, supra. The powers of a tribe in relations between it and nonmembers are diminished, however, because of its dependence upon the federal government. The tribe as quasi-sovereign is divested of any inherent power to exercise criminal jurisdiction over nonmembers. Duro v. Reina, 110 S. Ct. 2053, 58 U.S.L.W. at 4645; Oliphant, 435 U.S. at 212. Although the tribe's civil jurisdiction over nonmembers is not so divested, its power to regulate generally the conduct of nonmembers on reservation lands no longer held by or for the benefit of the tribe or its members is greatly diminished. See Brendale v. Confederated Tribes and Bands of Yakima Indian Nation, 492 U.S. ---, 109 S. Ct. 2994, 106 L. Ed. 2d 343 (1989) (plurality opinion); Montana v. United States, 450 U.S. 544, 101 S. Ct. 1245, 67 L. Ed. 2d 493 (1981); United States v. Anderson, 736 F.2d 1358 (9th Cir. 1984). The United

States Supreme Court has identified three situations in which the exercise of tribal civil jurisdiction over nonmembers on non-tribal land may be appropriate: (1) where Congress has expressly delegated jurisdiction to the tribe; (2) where a nonmember has essentially consented to tribal jurisdiction through a business relationship or otherwise; and (3) where the conduct of the nonmember imperils the tribe's political integrity, economic security, or health and welfare. Id.

To rule on the case as pleaded first requires that the Court dispose of two side issues raised in the briefs. Initially, this Court need not engage in a lengthy abrogation analysis as was required of the Eighth Circuit in Lower Brule. See Lower Brule, 711 F.2d at 821-27. The district court in Lower Brule erroneously concluded that South Dakota possessed exclusive jurisdiction to regulate hunting and fishing by all persons within the

Fort Randall and Big Bend taking area. See Lower Brule Sioux Tribe v. South Dakota, 540 F. Supp. 276, 287 (D.S.D. 1982), rev'd, 711 F.2d 809 (8th Cir. 1983). The basis for this conclusion was that a disestablishment of the Lower Brule reservation had occurred and that tribal jurisdiction over hunting and fishing by tribal members had been abrogated by Congress. But this Court has not been called upon to decide whether the Tribe has regulatory jurisdiction over hunting and fishing by tribal members on the taken area and on nonmember fee lands within the reservation. Although the State raised that issue in its trial brief, the State's complaint asks only that the Court declare the extent of tribal jurisdiction as it affects nonmembers on the lands in dispute.

Second, the question of state jurisdiction on the taken area or fee lands has been raised in the briefs and orders of

the Court. However, the State, limited to its complaint, has not asked this Court to decide whether South Dakota has jurisdiction over nonmember hunting and fishing on the taken area and nonmember fee lands. The tribal defendants succinctly stated the limits of the Court's inquiry:

It is important to note that this case does not involve the question of whether the state may also have jurisdiction over non-Indian activities on the taking area and deeded lands. The state, of course, is the plaintiff in this case. Its complaint seeks only to prohibit the exercise of tribal jurisdiction, not to establish the existence of state jurisdiction. . . . Nor did the tribal defendants counter claim for such relief. . . . Thus the pleadings in this case are insufficient to raise the question of whether the exercise of state jurisdiction on the reservation lands is preempted by tribal jurisdiction. That is how the parties tried the case as well. The state, for example, made no attempt to show how its interests would be injured if the tribe were to exercise exclusive jurisdiction over the areas in dispute. Similarly, the evidence presented by the tribal defendants was aimed at

demonstrating the need for tribal jurisdiction and not whether state jurisdiction should be precluded because it interferes with the achievement of tribal and federal objectives.

Tribal Defendants' Post Trial Memorandum, p. 5 (February 26, 1990).

The State disagrees with this statement. This Court, however, concludes that this case does not involve issues of preemption or tribal regulatory authority over nonmembers on tribal lands. See, e.g., Cotton Petroleum Corp. v. New Mexico, 490 U.S. ---, 109 S. Ct. 1698, 104 L. Ed. 2d 209 (1989); New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 130 S. Ct. 2378, 76 L. Ed. 2d 611 (1983); Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 102 S. Ct. 894, 71 L. Ed. 2d 21 (1982); White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 100 S. Ct. 2578, 65 L. Ed. 2d 665 (1980); Ramah Navajo School Bd., Inc. v. Bureau of Revenue of New Mexico, 458 U.S. 832, 102 S.

Ct. 3394, 73 L. Ed. 2d 1174 (1982). Thus, the Court's attention turns to the single question before it: whether the Tribe can regulate hunting and fishing by nonmembers within the taken area and upon nonmember fee lands.

A

The United States Supreme Court previously has addressed the issue whether a tribe has authority to regulate hunting and fishing by nonmembers on nonmember fee lands within the reservation. Montana v. United States, supra, involved a claim by the Crow Tribe of Montana that it, and not the state, had the authority to regulate hunting and fishing by nonmembers on non-Indian lands within reservation boundaries. In holding for the state, the Montana Court articulated a presumption that the relational law of the federal government and Indian tribes provides that the "exercise of tribal power beyond what is necessary to protect tribal self-

government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation."⁴ Montana, 450 U.S. at 564. See also Mescalero Apache Tribe v.

⁴Termed the "implied limitations doctrine" this tenet posits that retained sovereign powers of the Indian tribes were limited but not abolished as a result of their dependence on the United States. See F.Cohen, Handbook of Federal Indian Law 231 (1982) ed.) Certain retained powers were explicitly divested by treaty or congressional act. See Note, Tribal Power to Zone Nonmember Land Within Reservations: The Uncertain Status of Retained Tribal Power Over Nonmembers, 21 Ariz. St. L.J. 769, 774-79 (1989). Other powers were implicitly divested, however, as inconsistent with the dependent status of tribes. Cf. Oliphant, supra. Generally, inconsistent powers are those involving the external relations of a tribe. See e.g., United States v. Wheeler, 435 U.S. 313, 98 S.Ct. 1079, 55 L.Ed.2d 303 (1978); Knight v. Shoshone & Arapaho Tribes, 670 F.2d 900 (10th Cir. 1982); Cardin v. DeLaCruz, 671 F.2d 363 (9th Cir. 1982). Thus, Montana has not been applied by the Supreme Court in cases involving tribal sovereignty over tribal members on tribal land, i.e., matters of internal relations. See Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 102 S.Ct. 894, 71 L.Ed.2d 21 (1982); Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 107 S.Ct. 971, 94 L.Ed. 2d 10 (1987).

Jones, 411 U.S. 145, 93 S. Ct. 1267, 36 L. Ed. 2d 114 (1973); Williams v. Lee, 358 U.S. 217, 79 S. Ct. 269, 3 L. Ed. 2d 251 (1959); McClanahan v. Arizona Tax Comm'n, 411 U.S. 164, 93 S. Ct. 1257, 36 L. Ed. 2d 129 (1973); United States v. Kagama, 118 U.S. 375, 6 S. Ct. 1109, 30 L. Ed. 228 (1886) (United States may govern tribes within the geographical boundaries of the Nation by acts of Congress rather than controlling them by treaties).

The United States Supreme Court is divided over the issue whether Montana reverses traditional Indian law principles by establishing a presumption that tribes lack civil jurisdiction over nonmembers unless such authority is affirmatively delegated by Congress. This division was apparent in the Court's recent opinion in Brendale v. Confederated Tribes and Bands of Yakima Indian Nation, supra. In the separate opinions of Justices White and Blackmun, the presumption

issue surfaced when both sought to clarify Congress' role in authorizing tribal regulatory jurisdiction over nonmembers.

As the author of the decision of the Court as to the "open area," Justice White relied on Montana and Wheeler as support for the principle that, where "[a]n Indian tribe's treaty power to exclude nonmembers of the tribe from its lands" has been abrogated, Congress must affirmatively delegate to the tribe civil jurisdiction over nonmembers for such authority to exist. Brendale, 109 S. Ct. at 3006. Implicit divestiture of authority follows as "regulation of 'the relations between an Indian tribe and nonmembers of the tribe' is necessarily inconsistent with a tribe's dependent status" Id.

Joined in his opinion by only two other members of the Court, Justice Blackmun argued that Justice White's reading of the "general principle" fashioned in Montana ignores a

longstanding presumption which retains tribal civil jurisdiction to regulate nonmember conduct on the reservation. Id. at 3018. Justice Blackmun wrote, "'Civil jurisdiction over . . . activities [of non-Indians on reservation lands] presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute.'" Id. at 3020 (citing Iowa Mutual Ins. Co. v. LaPlante, 480 U.S. 9, 107 S. Ct. 971, 94 L. Ed. 2d 10 (1987)).

Justice Blackmun stated, however, that "to recognize that Montana strangely reversed the otherwise consistent presumption in favor of inherent tribal sovereignty over reservation lands is not to excise the decision from our jurisprudence." Brendale, 109 S. Ct. at 3021. The case still protects "significant tribal interests" which are "threatened or directly affected" as a result of on-reservation conduct by nonmembers. Id.

at 3022. Therefore, Montana's misreading of Indian-law jurisprudence is, in effect, offset by its solicitude for sovereignty jurisprudence. Id.

The effect of these opinions on Montana is unclear, and the opinion of Justice Stevens does little to clarify the discussion. Justice Stevens, who delivered the opinion of the Court in Brendale as to the "closed area," asserted that the power to exclude nonmembers from reservation lands includes the lesser power to determine the essential character of the area through land use regulation. Brendale, 109 S. Ct. at 3010. Derived from inherent Indian sovereignty and rights guaranteed it by treaty, a tribe's exercise of its power to define the character of the tribal community may entail the regulation of nonmember activities on lands owned by them. Id. Although the "unadulterated character" of the closed area required tribal zoning

authority over nonmembers, Justice Stevens concluded that the tribe had no similar interest in the open area. Id. at 3015.

Justice Stevens focused on the zoning authority context of Brendale and distinguished Montana on its facts. Montana did not "require a different result" because in that case the hunting and fishing regulation discriminated against nonmembers, the nonmembers' conduct did not threaten the welfare of the tribe, and the state had significant ownership and management interests in the property where the nonmember activity would be carried out. Id. at 3014.

In short, Montana remains viable case law precedent. With this in mind, Montana cannot be distinguished from the facts of this case. This case does not involve land use regulation, i.e., zoning, whereby the purported use of the property by the nonmember would be different than that of any tribal

member generally -- both members and nonmembers use the taken area and fee lands for hunting and fishing. This Court found that nonmember hunting and fishing activities pose no more threat to grazing livestock than does the similar conduct of tribal members. The Tribe's licensing regulations are discriminatory, preferring the needs of tribal members before those of nonmembers, both in the issuance of licenses and the fees charged. In addition, the Court found that the present dispute does not concern lands which, if severed from tribal control, would corrupt a uniquely Indian community. Finally, a significant portion of the reservation is owned by nonmembers and the United States. This Court, in looking to federal law as a source of regulatory jurisdiction, must apply the "general principle" propounded in Montana: unless Congress expressly delegated civil jurisdiction to the Cheyenne River Tribe over

nonmember hunting and fishing on the taken area and the nonmember fee lands, no such authority exists in the Tribe. Montana, 450 U.S. at 564. Cf. Application of Otter Tail Power Co., 451 N.W.2d 95, 101 (N.D. 1989) (examined Brendale and applied express congressional delegation analysis).

1

Article 2 of the 1868 Fort Laramie Treaty granted the Cheyenne River Tribe the "absolute and undisturbed use and occupation" of the territory reserved for it by Congress. This treaty further granted a tribal right to exclude nonmembers from its reservation and, implicitly, to "define the essential character" of the tribal community. See Brendale, 109 S. Ct. at 3010 (opinion of Justice Stevens). But Congress later championed other national interests by enacting legislation which encroached upon the Tribe's right to exclusively use and occupy

its reserved territory. In advancing its allotment policy,⁵ Congress passed the Act of 1889 which made it possible for lands originally allotted to tribal members to eventually pass by sale or inheritance to nonmembers. Yet the Act retained the reservation status of alienated land. See Mattz v. Arnett, supra. See also Note, Undermining Tribal Regulatory Authority: Brendale v. Confederated Tribes, 13 U. Puget Sound L. Rev. 349 (1990). Thirty years later Congress further diminished tribal ownership of reservation lands when it passed the Act of 1908 and opened unallotted or surplus lands to non-Indian homesteading. Finally, more reservation lands were taken along the Missouri River by the United States pursuant to the Flood Control and Cheyenne River Acts.

⁵See General Allotment Act of 1887, 24 Stat. 388 (codified as amended at 25 U.S.C. §§ 331 et seq.); Solem v. Bartlett, 465 U.S. 463, 104 S.Ct. 1161, 79 L.Ed.2d 443 (1984).

As a result, the Tribe could no longer exclude any person from lands owned by nonmembers or the United States.

A final consequence of each of these Acts was to alienate certain lands from the Tribe for the benefit of nonmember settlers or for the United States. As was made clear in Montana:

. . . treaty rights with respect to reservation lands must be read in light of the subsequent alienation of those lands. Accordingly, the language of the 1868 [Fort Laramie] treaty provides no support for tribal authority to regulate hunting and fishing on land owned by the non-Indians.

Montana, 450 U.S. at 561. See also Brendale, 109 S. Ct. at 3003-04 (Justice White's discussion of Yakima Treaty of 1859).

The Act of 1908 reserved for the Cheyenne River Indians "any benefit to which they are entitled under existing treaties or agreements not inconsistent with the provisions of this Act." 35 Stat. 464, § 9 (emphasis supplied).

But, because the Tribe alienated certain reservation lands pursuant to the allotment policy regulatory power in the Tribe over those lands now held in fee by nonmembers would be inconsistent with the Act. The 1868 Fort Laramie Treaty did not grant the Tribe civil jurisdiction over hunting and fishing on land owned by nonmembers. Dispositive of the nonmember fee lands issue is the fact that nowhere in the Act of 1908 does Congress expressly delegate to the Tribe the authority to regulate hunting and fishing by nonmembers on allotted lands.

Turning to the taken area, the avowed purpose of the Cheyenne River Act was the acquisition of those lands necessary for the construction of the Oahe Dam and Reservoir Project, not, as was the goal of the Act of 1908, "the ultimate destruction of tribal government." Montana, 450 U.S. at 506 n.9.

The Cheyenne River Act dealt primarily with payment to the Tribe for damages resulting from the flooding of its valuable bottomlands. The sum of \$10,644,014 was appropriated in payment for the taken lands and interests therein. Including loss of wildlife, grazing permit revenue loss, the rehabilitation of all tribal members, the relocation and reestablishment of the displaced tribal members, and the cost of negotiating the agreement. 68 Stat. 1191, §§ 2, 5, and 13. Other unspecified sums were to be appropriated for the relocation of cemeteries and the relocation and reconstruction of Cheyenne River Agency, hospitals, schools, and other public buildings and roads. Id. at §§ 3-4.

Federal damages relief commanded the lion's share of the debate and the negotiations. An appraisal made by Gerald T. Hart and Associates (hereafter Hart appraisal) concluded that the Oahe Dam and Reservoir

Project would require the taking of 104,420 acres of the Cheyenne River Reservation at a fair market value of \$1,605,410. The Hart appraisal was unacceptable to both the Department of the Interior and the Tribe and negotiations ensued to reach an agreement of the value of the land and interests to be conveyed. See S. Rep. No. 2489, 83rd Cong., 2d Sess. 3. Subsequent hearings before the Senate and House Committees, and negotiations with the Corps of Engineers, the Missouri River Basin investigation staff, and a delegation from the tribal council concentrated on the issue of damages, without discussion of tribal authority over nonmember activities on the taken area. See generally House of Representatives, Hearings Before the Committee on Interior and Insular Affairs, Joint Senate and House Subcommittee on Indian Affairs, on H.R. 2233 and S. 695 (May 19, 1954); Tribal Memorial (May 20, 1954); Frank

Ducheneaux, et al., "Oahe: Report of Washington Delegation" (January 21-31, 1953); Missouri River Basin Investigation Project No. 138, "Damage to Indians of Five Reservations from Three Missouri River Reservoirs in North and South Dakota," (April 1954). On the collateral issue of damages, the Court notes that, though the Cheyenne River Act compensated the Tribe for grazing permit revenue loss, the failure of the United States to make additional appropriations to the Tribe for loss of wildlife revenue does not implicitly grant it the right to control wildlife resources and the use thereof by nonmembers.

The Cheyenne River Act expressly granted tribal members certain rights and privileges incidental to hunting and fishing within the exterior boundaries of the reservation. The Act provides in § 10:

. . . [T]he said Indian Tribe and the members thereof shall have the right to graze stock on the land between the level of the reservoir and the taking line. . . . The said Tribal Council and the members of said Indian Tribe shall have, without cost, the right of free access to the shoreline of the reservoir including the right to hunt and fish in and on the aforesaid shoreline and reservoir, subject, however, to regulations governing the corresponding use by other citizens of the United States.

68 Stat. 1191, § 10.

Nevertheless, an inescapable consequence of the Cheyenne River Act was the transfer of fee ownership from the Tribe to the United States and the abrogation of the Tribe's treaty right to the exclusive use and occupation of the taken lands. The language of the Cheyenne River Act reveals no congressional intention, either express or implied, to delegate to the Tribe civil jurisdiction over nonmembers on the taken area. While § 10 confers hunting and fishing rights upon the Tribe, those rights are

restricted regarding the "corresponding use by other citizens of the United States," meaning, presumably, nonmembers.⁶ Giving the words their ordinary meaning, the Court concludes that § 10 does not affirmatively authorize the Tribe to exercise civil jurisdiction over nonmembers on the taken area.

⁶This is not to say that § 10 expressly endorses the application of state civil jurisdiction over the recreational activities of nonmembers. The Eighth Circuit concluded that an identical "corresponding use" clause in both the Fort Randall and Big Bend Acts:

does not clearly and unambiguously subject the hunting and fishing rights of the Lower Brule Sioux to state regulations. Indeed, the clause makes no explicit reference to state law, and thus, the "regulation" contemplated could be either by the federal government through the Secretary of Army and Corps of Engineers or by the State.

Lower Brule, 711 F.2d at 824.

What is relevant here is not whether this clause grants South Dakota regulatory jurisdiction over nonmembers on the taken area, but whether it expressly delegates that authority to the Tribe.

The legislative history surrounding the passage of the Cheyenne River Act does not compel a different conclusion. The reports of the Secretary of the Army to the House and Senate committees on Interior and Insular Affairs recommended that § 10 be eliminated as it "would involve complications since there are numerous tracts within the reservation which are owned by non-Indians." H.R. Rep. No. 2484, 83d Cong., 2d Sess. 11.; S. Rep. No. 2489, 83d Cong., 2d Sess 12. Otherwise, the agency reports on the bill submitted to Congress request no change. There is no mention of tribal jurisdiction over nonmember hunting and fishing.

An examination of the myriad hearings and negotiations which were held prior to the passage of the Cheyenne River Act illuminates only one instance where a discussion of § 10 addressed tribal jurisdiction on the taken area. Counsel for the Tribe, Mr. Ralph Case,

made this remark in a hearing before the joint Senate and House committee:

Now, the right to hunt and fish is a tribal right. It is still preserved and is still holding. No white citizen of South Dakota can go on this reservation and hunt unless he has first obtained a license from the Tribal Council. Our right to continue hunting and fishing is to us an extremely valid and valuable right. It is an ancient right. It is all that is left of our lives as they existed a hundred years ago.

Hearings before the Committee on Interior and Insular Affairs, S. 695 Joint Hearing, Acquisition of Lands for Oahe Reservation and Indian Rehabilitation, 289 (May 20, 1954).

Read in context, however, it is the Court's understanding that Mr. Case was referring to tribal jurisdiction at the time of the hearing and was not alluding to future jurisdiction of the Tribe over nonmember hunting and fishing once the lands were

actually taken.⁷ Thus, Mr. Case's use of the word "Now" should preface every statement made in the excerpted paragraph. In any event, this isolated statement falls short of the affirmative congressional action contemplated by Montana.

Circumstances surrounding the Cheyenne River Act indicate that the jurisdiction issue simply was not considered. The Tribal Memorial recommends passage of the bill as submitted and fails to address any jurisdictional conflicts which might result therefrom. In addition, a comprehensive

⁷The first comments of Mr. Case with regard to § 10 converge on the grazing rights issue. Whether the United States would take fee title to the taken area or merely a flowage easement was a subject of grave concern to tribal members with grazing interests in the bottomlands and required the attention of the committee. Except for the comments of Mr. Case on the continued hunting and fishing rights of the Tribe, however, none of the committee members asked questions on this provision or contributed to the discussion in any way.

report from the Missouri River Basin investigation staff of the Department of the Interior discussed in depth the economic impact upon the Indians which would result from the Oahe and Fort Randall Dam and Reservoir Projects, but also failed to comprehend the jurisdictional problems created by the bill. See generally Missouri River Basin Investigation Project No. 138, "Damage to Indians of Five Reservations from Three Missouri River Reservoirs in North and South Dakota," (April 1954).

It is equally clear that other legislation read in pari materia with the Cheyenne River Act did not grant tribal jurisdiction over nonmembers on nonmember fee lands or the taken area. The Indian Reorganization Act of 1934, 48 Stat. 984 (codified as amended at 25 U.S.C. §§ 461 et seq.), acknowledged and reaffirmed the governmental authority of the Tribe. This Act

sought "to encourage economic development, self-determination, cultural plurality, and the revival of tribalism." F. Cohen, Handbook of Federal Indian Law 147 (1982 ed.). The Tribe's adoption of the provisions of the Indian Reorganization Act did not expand reserved treaty rights, but instead preserved existing treaty rights. The same can be said of P.L. 280 which did not change state jurisdiction over the on-reservation activities of nonmembers nor did it authorize civil jurisdiction over nonmember hunting and fishing on the taken area and fee lands. The statute merely preserved the scope of then-existing tribal jurisdiction. See Bryan v. Itasca County, 426 U.S. 373, 387, 96 S. Ct. 2102, 48 L. Ed. 2d 710 (1976); Cardin v. De La Cruz, 671 F.2d 363 (9th Cir.), cert. denied, 459 U.S. 967, 103 S. Ct. 293, 74 L. Ed. 2d 277 (1982); White Mountain Apache Tribe v. Arizona, 649 F.2d 1274, 1279 (9th Cir. 1981).

Finally, 18 U.S.C. § 1165, the federal trespass statute, authorizes federal jurisdiction over the taken area solely because the Cheyenne River Act granted tribal members hunting and fishing rights on the project lands. This trespass statute expands federal, not tribal, jurisdiction. See generally New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 337-38, 103 S. Ct. 2378, 76 L. Ed. 2d 611 (1983).

The Court is cognizant of the detrimental effect the Cheyenne River Act had upon the Tribe and concurs with this statement by the tribal defendants:

. . . [I]t is plain that the Cheyenne River Sioux Tribe and its members sacrificed the best lands of their reservation in order that this federal project might be built. Whatever the value of the Reservoir to the nation as a whole, it conveyed no benefit on the tribe or tribal members. To the extent that Public Law 776 [Cheyenne River Act] is ambiguous, it should be interpreted in a fashion that allows

the fullest possible protection of the rights that the tribe retained.

Tribal Defendants' Post Trial Memorandum, p. 89 (February 26, 1990). Indeed, the Cheyenne River Act should be construed so as to defend those rights retained by the Tribe. But it cannot be ignored that the right to exclude or regulate nonmembers on land which is owned by the United States for the benefit of the general public is extraneous to the 1868 Fort Laramie Treaty and subsequent federal legislation affecting those treaty rights. The Court, in completing an examination of the Cheyenne River Act, must conclude that, although the Cheyenne River Act acquired only those property interests necessary to the construction of the Oahe Dam and Reservoir Project, Congress did not affirmatively delegate civil jurisdiction to the Tribe over nonmember hunting and fishing activities on the taken area.

In an exhaustive examination of the Flood Control Act and the Act of September 30, 1950, 64 Stat. 1093 (hereafter Act of 1950), the State traces each Act's history to a conclusion that jurisdiction over nonmembers on the taken lands rest with the State. Without commenting on this conclusion, the Court finds instead that neither Act takes an affirmative step towards delegating jurisdiction over nonmember hunting and fishing on the taken area to the Tribe. The Court's inquiry is limited to whether Congress expressly delegated jurisdiction to the Tribe, not whether Congress intended jurisdiction to pass to the State, or, for that matter, the federal government.

Both the Flood Control Act and the Act of 1950 concerned the acquisition of project lands and the interests to be conveyed to the United States. There is nothing in the Acts themselves or their discussion on the floors

of Congress and in committee that raises the specter of tribal jurisdiction over nonmembers on the taken lands.

Congress, pursuant to § 1 of the Flood Control Act, invoked the dominant jurisdiction of the United States over "the rivers of the Nation" and authorized the construction of works to improve navigation and flood control. The Act accommodates the interests of the affected states in continued access to and use of the rivers and shorelines. The rights of Indian tribes were set aside for the moment as Congress addressed the specific interests of the various states and tribes through subsequent legislation.⁸

⁸The parties focused much attention on § 4 of the Flood Control Act of 1944. Section 4 allows general public use of the project reservoirs subject to regulation by the Corps of Engineers. The final sentence of § 4 states:

No use of any area to which this section applies shall be permitted which is
(continued...)

⁸(...continued)
inconsistent with the laws for the protection of fish and game of the state in which such area is situated.

The Eighth Circuit in Lower Brule disagreed with the district court's conclusion that § 4 of the Flood Control Act of 1944 authorized the application of South Dakota's laws to hunting and fishing activities by tribal members in the Fort Randall and Big Bend taking area. Lower Brule, 711 F.2d at 825 n.23. In concluding that the provision authorized federal, not state, regulation, the Eighth Circuit noted that, "there is simply no indication in the Legislative history that Congress even considered Indian rights when it adopted section 4." Id. This observation lead to this statement by the Court:

The "inconsistent use" provision in section 4, however, might well be relevant to the issue of whether the Tribe or the state has jurisdiction to regulate hunting and fishing by nonmembers within the Fort Randall and Big Bend taking areas. See New Mexico v. Mescalero Apache Tribe, ___ U.S. ___, 103 S.Ct. 2378, 76 L.Ed.2d 611 (1983); Montana v. United States, 450 U.S. 544, 101 S.Ct. 1245, 67 L.Ed.2d 493 (1981); White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 100 S.Ct. 2578, 65 L.Ed.2d 665 (1980). Because we remand this issue to the district court . . . we need not here determine the relevance of section 4 to the question of

(continued...)

Finally, the Act of 1950 was enacted merely to authorize the Army and Interior Departments to negotiate a contract with the Tribe for the purchase of project lands. The best that can be said of the Act is that it sought to preserve treaty hunting and fishing rights, though South Dakota would disagree with this statement. But, again, treaty-reserved hunting and fishing rights did not expressly delegate tribal regulatory authority over nonmembers on lands within the reservation that were owned by the United States for the general public. The Court can

⁸(...continued)
jurisdiction over nonmembers of the Tribe.

Id.

One of the issues facing this Court is whether the Tribe has jurisdiction over nonmember hunting and fishing on the taken area. According to Montana, § 4 is relevant only to the extent that it fails to expressly authorize the application of tribal law over nonmembers.

only conclude then that the Act of 1950 fell short of the express congressional delegation of authority required by Montana.

In looking at the preceding discussion, no affirmative action of Congress subjects nonmembers who are hunting or fishing on nonmember fee lands or on the taken area to the civil jurisdiction of the Tribe.

3

The tribal defendants contend that denying the Tribe jurisdiction over the taken area and fee lands runs afoul of the Lacey Act, 16 U.S.C. §§ 3371 et seq. Section 3372 provides in relevant part:

(a) It is unlawful for any person --

(1) to import, export, transport, sell, receive, acquire, or purchase any fish or wildlife or plant taken or possessed in violation of any law, treaty, or regulation of the United States or in violation of any Indian tribal law

16 U.S.C. § 3372(a)(1) (1981).

A recent Eighth Circuit opinion concluded that a nonmember's failure to obtain a tribal fishing license and subsequent violation on taken lands was chargeable under the Lacey Act. United States v. Big Eagle, 881 F.2d 539 (8th Cir. 1989), cert. denied, --- U.S. ---, 110 S. Ct. 1145, 107 L. Ed. 2d 1049 (1990), involved a nonmember Indian caught engaging in commercial fishing without a license on the Lower Brule Reservation taken area. Indicted under the Lacey Act, Big Eagle argued that he was not in violation of any Indian tribal law because the Lower Brule Tribe had no regulatory jurisdiction over him. The Eighth Circuit disagreed, however, stating that "the crucial inquiry is whether the acts complained of took place within the reservation and not, as Big Eagle insists, whether the Lower Brule Tribe itself has the power to prosecute." Id. at 541. The Lacey Act essentially authorizes federal jurisdiction over all reservation

lands without regard to the membership status of a defendant or the power of a tribe to enforce its regulations. Id. Thus, Big Eagle decided only that the United States has jurisdiction over all persons on all lands within the reservation and did not resolve any question of the scope of tribal jurisdiction over nonmembers on the taken area. This holding is consistent with the legislative history of the Act. See H.R. Rep. No. 276, 97th Cong., 1st Sess. 14; S.Rep.No. 123, 97th Cong., 1st Sess. 5.

The Lower Brule tribal law consisted of a settlement agreement between it and the State which required the purchase of either a state or tribal fishing permit. Big Eagle, 881 F.2d at 541. Because of this settlement agreement, the Appeals Court rejected any attempt to read Big Eagle as intimating its position with regard to future state-tribal jurisdictional conflicts:

Thus, we do not find it necessary to decide the questions left open in Lower Brule. It would be inappropriate to do so in a case where the State of South Dakota is not a party, and where the necessary historical and administrative evidence has not been submitted. See New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 103 S. Ct. 2378, 76 L. Ed. 2d 611 (1983); Montana v. United States, 450 U.S. 544, 101 S. Ct. 1245, 67 L. Ed. 2d 493 (1981).

Id. at 542 n.2.

Nevertheless, the tribal defendants argue that it should have jurisdiction over all persons on the taken and fee lands because the effect of Big Eagle is that tribal licensing requirements ultimately will be enforced -- by either the Tribe or the United States. But this is irrelevant to the State's complaint. The scope of the federal government's prosecutorial powers under the Lacey Act is unrelated to the question whether the Tribe can exclude nonmembers from the taken area or fee lands. A recognition that the United

States may choose to enforce tribal regulations against nonmembers on all reservation lands does not force a concession from this Court, that like jurisdiction must therefore exist in the Tribe. See 16 U.S.C. § 3378(c)(3).

B

Congressional delegation of authority is not the exclusive source of tribal civil jurisdiction over nonmembers on lands within the reservation. The United States Supreme Court pronounced two "exceptions" to Montana's general principle when it wrote:

Though Oliphant only determined inherent tribal authority in criminal matters, the principles on which it relied support the general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe. To be sure, Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservation, even on non-Indian fee lands. A tribe may regulate, through taxation, licensing or other means,

the activities of nonmembers who enter into consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements. . . . A tribe may also retain inherent power to exercise civil authority over the conduct on non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe. . . .

Montana, 450 U.S. at 565 (citations omitted).

No "consensual relationship" exists here as nonmember hunters and fishermen on nonmember fee land and the taken area "do not enter any agreements or dealings with the [Cheyenne River] Tribe so as to subject themselves to tribal civil jurisdiction." Id.

The Tribe, therefore, may have civil authority over hunting and fishing activities by nonmembers on the taken lands or the nonmember fee lands only if that conduct

"imperils" "significant tribal interest."⁹

⁹This section source of regulatory authority has been called an "exception" to Montana's general rule. See, e.g., Brendale, 109 S.Ct. at 3018 (Justice Blackmun); Note, Undermining Tribal Land Use Regulatory Authority: Brendale v. Confederated Tribes, 13 U. Puget Sound L. Rev. 349, 357 (1990); Note, 21 Ariz. St. L.J. at 777 (cite in note 3). Whether self-government and internal relations create an exception to the implied limitations doctrine, supra, n.3, or are an independent basis for tribal jurisdiction, this alternative source of civil authority flows from the inherent powers retained by tribes as dependent sovereigns. Doctrinal developments in Indian law evolved from early American sovereignty jurisprudence which recognized the international law of nations to subject all persons within their borders to laws that further legitimate political, social, and economic interest. See F. Cohen, Handbook of Federal Indian Law 232 (1982 ed.). An anomaly exists, however, in the relations of tribes within the United States which permits them less than the "full attributes of sovereignty." McClanahan v. Arizona Tax Comm'n, 411 U.S. 164, 173, 93 S.Ct. 1257, 36 L.Ed.2d 129 (1973). The tribes as conquered nations lost their right to determine external relations and retained only the "power of regulating their internal and social relations." Id. Any exercise of power beyond that necessary to territorial management, according to principles of Indian law, must be granted by Congress.

(continued...)

Brendale, 109 S. Ct. at 3008, 3018. This Court has previously stated in its findings of fact, however, that tribal regulation of hunting and fishing by nonmembers on the two types of land at issue does not pose a threat to the political integrity, the economic security, or the health and welfare of the Cheyenne River Tribe.

The success of the tribal game and fish management program and the protection of tribal hunting and fishing interests does not depend upon the Tribe's ability to regulate nonmember hunting and fishing activities on the two types of land involved in this case. Even though tribal lands contribute to the well-being of wildlife throughout the

⁹(...continued)
The Ninth Circuit has applied Montana with the most frequency. See, e.g., Confederated Tribes & Bands of Yakima Indian Nation v. Whiteside, 828 F.2d 529, 534 n.1 (9th Cir. 1987), aff'd in part, rev'd in part, 492 U.S. ___, 109 S.Ct. 2994, 106 L.Ed.2d 343 (1989).

reservation, such is the nature of game management between states as well. Thus, it is not necessary for the Tribe to regulate nonmembers on the taken area and fee land to effectively manage game populations throughout the reservation. It must be remembered that the Tribe's programs to enhance game and fish populations encompass the entire reservation because it still retains jurisdiction over its members throughout the reservation. As both the Tribe and the State are ultimately concerned with the effective management of game populations -- the Tribe over its reservation, the State over Dewey and Ziebach counties -- negotiation and compromise still may be required to some extent.

Nonmember conduct on the taken area and fee lands does not jeopardize the efficacy of hunting and fishing by tribal members for subsistence purposes. Subsistence activities of tribal members are not weighed by tribal

conservation personnel when establishing season and bag limits. In fact, subsistence hunting and fishing is not monitored by the Tribe at this time.

A paramount tribal interest in the recreational activities of its members on the fee lands and taken area does not exist, except insofar as it generates additional revenues. Yet loss of revenue from sales of hunting and fishing licenses to nonmembers would not imperil the economic security of the Tribe. The tribal game and fish management program is funded almost entirely through P.L. 638 contracts with the BIA. 25 C.F.R. § 271.32 (1989). The Tribe realizes little revenue from the purchase of fishing licenses by nonmembers. Moreover, the Tribe has failed to develop the Oahe fishery for its own gain despite the fact that, in the past, it has asserted jurisdiction over all persons on the taking area.

Tribal regulation of nonmember hunting and fishing on the taken area is not necessary to protect the Tribe's interest in issuing grazing permits for "sustained yield management and development" and in its tribal members' grazing livestock and other property. Title XV, Cheyenne River Sioux Tribe Grazing Code, p.1 (1988-1993). While the Tribe cooperates with the BIA in safeguarding its members' grazing permits, grazing livestock and other Indian property can be adequately protected through the United States, the state of South Dakota, or reciprocal tribal agreements. See Duro, 110 S. Ct. at 2065-66 (discussing sources of lawful authority to punish nonmembers). The Tribe and the State adequately monitor the hunting and fishing activities of persons on the taken area to prevent such abuses.

This Court must conclude therefore that the Cheyenne River Tribe has no significant

interests bearing on its internal relations which necessitate the assertion of regulatory authority over nonmembers on non-trust lands.

CONCLUSION

The boundaries of the Cheyenne River Reservation as established by the Act of 1889 remain unaltered. And though the Tribe has the treaty power to exercise regulatory jurisdiction over tribal members throughout the entire reservation. Congress has not expressly delegated to the Tribe hunting and fishing jurisdiction over nonmembers on lands within the exterior boundaries of the reservation which are held in fee by nonmembers or which were taken by the United States for the construction of the Oahe dam and reservoir. Finally, tribal regulatory authority over nonmembers on these lands is not necessary to protect and political integrity, economic security, or health and welfare of the Tribe. Accordingly, the tribal

defendants are permanently enjoined from attempting to exclude nonmembers from hunting and fishing on nonmember fee lands or the taken area within the Cheyenne River Reservation, or in any way attempting to regulate such activities.

The Court makes no finding and reaches no conclusion as to the exercise of state jurisdiction over nonmembers on the fee lands and the taken area, see California v. Cabazon Band of Mission Indians, 480 U.S. 202, 107 S. Ct. 1083, 94 L. Ed. 2d 244 (1987), or as to the reach of tribal civil jurisdiction over nonmembers on trust land, see Merrion v. Jicarilla Apache Tribe, supra. This memorandum opinion constitutes the Court's findings of fact and conclusions of law.

BY THE COURT:
/s/ Donald J. Porter
CHIEF JUDGE

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
CENTRAL DIVISION

STATE OF SOUTH DAKOTA,

Plaintiff,

vs.

CIV. 88-3049
JUDGMENT

WAYNE DUCHENEAUX, personally and
as Chairman of the Cheyenne River
Sioux Tribe, and LENITA MINER,
personally and as Director of
Cheyenne River Sioux Tribe Game,
Fish and Parks,

Defendants.

The findings of fact and conclusions of law of the Court in the above action were filed with the Clerk of this Court in a memorandum opinion on August 21, 1990. It is now

ORDERED that the Judgment of the Court is rendered as set out in the memorandum opinion.

Dated August 22, 1990.

ATTEST:
WILLIAM F CLAYTON, CLERK
By /s/ Carol L. Merrill
Deputy

BY THE COURT:
/s/ DONALD J. PORTER
CHIEF JUDGE

FISH AND GAME REGULATIONS

GOVERNING FISHING, HUNTING, AND TRAPPING
 WITHIN THE BOUNDARIES OF THE CHEYENNE RIVER
 RESERVATION, SOUTH DAKOTA.

Be it enacted by the Cheyenne River Sioux Tribal council in regular meeting, assembled on August 5, 1937.

Section I. Permits required or Licenses.

It shall be unlawful for any nonmember of the Cheyenne River Sioux Tribe of Indians to fish or hunt within the Reservation except as hereinafter provided, without first having procured a Reservation permit to do so and then only during the respective periods of the year as provided by the State laws, Federal Migratory Bird Treaty and Tribal Ordinances. Members of the Tribe shall abide by the Federal Migratory Bird Treaty Act and shall fish and hunt upland birds only during the

respective periods of the year as provided by the State Laws.

Section II. Permits to Use Seines or Nets. Catching Fish Except with Pole, Line and Hook. Use of Seines. Penalties. No person, including members of the Tribe, shall take or catch in any of the streams, lakes or ponds of the Reservation except with a pole in hand, line and hook, nor shall any person including members of the tribe take or catch fish with a hook baited with any poisonous substances or by means of dams, or by the use of fish traps and grab hooks, seines or similar means for catching fish.

. . .

Section VIII. Trapping of Beaver. Any person, before trapping, taking, or killing beaver in any manner, on the Cheyenne River Reservation shall make application to the Tribal Council for a permit to take, kill or trap, such beaver, and shall state in said

application the description of the land, lake or stream from which the beaver are to be taken.

The Tribal Council shall have full power to approve, or disapprove said application, and shall have full power to designate the number of beaver which may be taken upon such land, lake or stream, for which the permit may be granted.

Said permit, when granted, shall be written in triplicate, original being delivered to the permittee, one copy to be retained by the Indian Agency Office, and one copy to be mailed to the State Fish and Game Commission, Pierre, South Dakota.

Said beaver skins taken under such permit shall be delivered to the Office of the Indian Agency, and shall be stamped with a rubber stamp in indelible ink on the inside of the skin, or tagged with a metal tag, which tag shall be locked or sealed so as to be

incapable of removal, except by destruction of the tag, and which stamp or tag shall be evidence that such beaver skins have been legally taken upon the Indian Reservation, and such skins so stamped or tagged may be sold, traded, or used in any manner upon the Indian Reservation, but may not be transported or sold off the Reservation without first having been tagged by the State Fish & Game Commissioner, with such tags as are issued by said Fish & Game Commission, which tags may be obtained upon the copy of the permit which has been filed with the Fish & Game Commission, at such cost as is prescribed by the State Game Laws.

Permits, when issued by the Tribal Council shall be nontransferable.

Any fur buyer, firm or corporation, when purchasing furs from Indians on the Cheyenne River Reservation, shall file a report with the Indian Agency Office setting forth the

species of such furs purchased, number of furs purchased, and shall report any and all furs purchased on the Reservation or from any person, either Indian or White.

It shall be unlawful for any Indian to sign any affidavit or statement, that he has trapped, killed or taken beaver skins on the Reservation which skins have not been taken under a permit issued by the Tribal Council to said Indian making such affidavit or statement.

. . . .

Section XII. Big Game. Closed season is hereby extended on the Cheyenne River Reservation on all big game animals including deer and antelope.

. . . .

Section XVI. Summary. The main provisions of this Ordinance are herewith set forth in condensed form for the purpose of

informing persons interested in the principal features.

1. All persons shall procure a license or permit, to hunt, fish or trap.
2. All persons shall abide by the Federal Migratory Bird Treaty.
3. Members of the Tribe shall not be required to secure permits to fish, or hunt upland birds.

ORDINANCE GOVERNING NONMEMBERS
VIOLATING FISH AND GAME REGULATIONS

Be it enacted by the Cheyenne River Sioux Tribal Council in regular meeting assembled on August 5, 1937.

Any person not subject to the jurisdiction of the Cheyenne River Sioux Indian Court who violates any provision of the "Fish and Game Regulations Governing Fishing, Hunting and Trapping within the Boundaries of the Cheyenne River Indian Reservation, South Dakota," shall be turned over to the custody of any Federal or State Law enforce-officer for prosecution under Federal or State Law. Any License issued to such person shall be suspended forthwith pending revocation or other action by the Tribal Council.

The foregoing Ordinance was adopted by the Cheyenne River Sioux Tribal Council on September 8, 1937, at a regular meeting of the Tribal Council by a vote of 12 for and 0

against, and shall be effective from the time of approval of this Ordinance by the Superintendent of the Cheyenne River Agency or the Secretary of the Interior, in accordance with Article IV, Section II of the By-laws of the Cheyenne River Sioux Tribe in South Dakota and Article IV, Section I, (1) of the Cheyenne River Sioux Constitution, approved on December 27, 1935, pursuant to the Act of June 18, 1934 (48 Stat. 984).

Dated: September 16, 1937.

/s/ Luke Gilbert
Chairman, Cheyenne River Sioux Tribal
Council
Approved: W.F. Dickens, Supt.
Dated: September 16, 1937

Exhibit 61

ADVANCEMENTS IN WILDLIFE MANAGEMENT
ON INDIAN LANDS

Laurits W. Krefting
U.S. Fish and Wildlife Service
St. Paul, Minnesota

In 1941, the U.S. Fish and Wildlife Service was given the responsibility of carrying out wildlife research on Indian lands. Since that time, biologists of this Service have been making surveys of the major reservations and working toward a better appreciation and understanding of wildlife management problems on these lands. This work has been done under the Interior Department interbureau agreement of August 7, 1941, between the Office of Indian Affairs, the Indian tribes and the Fish and Wildlife Service. Their problems have been approached by studying the animals as well as by acquiring a knowledge of the Indians' concept of wildlife as a utility rather than as

recreation. This paper summarizes the accomplishments that have been made in assisting the various tribes in the Lake States and the Dakotas in managing their wildlife resources. In this area there are approximately 8 million acres of Indian land with a population of some 75,000 Indians.

Until recently the animal population has been on a downward trend on many reservations in this area. This has been due to an unwillingness on the part of the Indians to restrict themselves in harvesting their wildlife crops and to their lack of concern in planning for the future. Since the passage of the Indian Reorganization Act of 1934, the tribes which accepted its provisions are becoming more self-governed than previously. Hence, they have been able to formulate constitutions and by-laws which give them the power to set up restrictive regulations for managing their wildlife. Due to the fear of

losing their ancient trapping, hunting, and fishing rights, progress in inaugurating game ordinances has been slow. However, progress has been made during the past 4 years in changing this concept. While only eight tribal councils have adopted game ordinances to date, these are in effect on approximately 6 million acres or 75 per cent of the Indian land in this region. These ordinances are concerned chiefly with the actions of non-Indians on Indian lands but they also contain limited provisions respecting the conservation of wildlife by Indians. On many reservations, ordinances would be ineffective due to their small size or to the scattered nature of the land ownership. State game laws are in effect on the large proportion of such areas that is under non-Indian ownership.

Education in wildlife conservation.--When the work on Indian lands was initiated, education in wildlife conservation was

recognized to be of basic importance in establishing plans for future wildlife management. In carrying out this program, much attention has been given to visual education through the use of movie films. This visual aid was made possible through cooperative agreements between the conservation departments of Minnesota and Wisconsin, the South Dakota A and M College and the U.S. Fish and Wildlife Service. Approximately 300 showings have been made in 19 school systems to approximately 51,000 students and adults. Special movies of wildlife-conservation projects on Indian lands have also been taken during the past 4 years. Films will be prepared from this photographic material for demonstrating the process made by Indians in wildlife management. Prepared film strips on conservation subjects have also been furnished to schools.

Advantage was also taken of every opportunity to present talks to students and adults and to assist school superintendents in organizing courses of study. Lists of books were prepared for classroom use and for libraries and copies of some of the better books were circulated in the schools. Special teaching aid outlines were also supplied to the schools. Since published material from the Indian conservation viewpoint was very limited, a wildlife reader was prepared by one of the Indian school teachers. This reader is now being used in a number of the reservation schools.

To stimulate more interest in wildlife conservation, one of the schools carried on a pheasant-rearing project while another operated fish rearing pond. Among the adults, a sportsmen's club has been organized and there are prospects that other groups will be likewise.

Big game.--Although it is generally assumed that Indian reservations have been depleted of their big game, this is not true in all cases. Recent surveys on the more important reservations in this region indicate a total big game population of approximately 12,130. This total includes the following species: white-tailed deer, 10,500; mule deer, 370; moose, 80; elk, 80; antelope, 300; and the black bear, 800.

On the Rosebud Reservation in South Dakota, protection against hunting has made it possible for the deer to increase at a rapid rate. A regulated open season was possible for the first time in the fall of 1944. During that season 32 Indians purchased tribal licenses and in spite of unfavorable weather, they bagged 23 buck deer. The younger men were very enthusiastic about the hunt but the older ones felt that the license fee entitled them to a deer regardless of how or when they

got it. This is another example to show that the younger Indians are beginning to think of wildlife in terms of sport while the older individuals still cling to the concept of game as a utility.

White-tailed deer on the Cheyenne River Reservation in South Dakota has been protected since 1937. In 1942, the herd was estimated at 90 and at 200 in 1945. Within a few years it will be possible to have an open season there under a permit system.

The deer herd on the Grand Portage Reservation in Minnesota has been estimated at about 400 during the past few years and it has only been necessary to provide protection for them during the summer months. Non-Indians are also permitted to hunt on this reservation during the regular state seasons provided they obtain a permit from the tribal council and reside at the Indian lodge.

Antelope on the Cheyenne River Reservation have been protected since 1937 and this herd has been on the increase since that time. In 1942, the population was estimated at 200, while in 1945 it was believed to have increased to about 250. Seventy-five per cent of this reservation is suitable for antelope, and the range will support between 1,500 and 2,000 animals, provided the carrying capacity of the reservation is not exceeded by the combined stocking with domestic animals and wildlife. When that population of antelope is reached, it will be possible to have a limited annual harvest. Several small bands of antelope occur on the Standing Rock and Fort Berthold Reservations in North Dakota, but they are unprotected at the present time.

Black bear occur in fair numbers on most of the reservations in the Lake States and the present population is estimated at 800. Since most Indians do not utilize bear to any great

extent, there appears to be little need of giving them much additional protection.

Eighty elk have been estimated for the Dakota reservations but most of these are under fence. Future management of this species on Indian reservations does not hold much promise, because of the comparative scarcity of suitable environment, and the likelihood of interference with farming.

An estimated moose population of 80 animals occurs on the Grand Portage, Nett Lake, and Red Lake Reservations in Minnesota although they are given practically no protection at the present time. There appears to be little chance of increasing this population and moose in similar areas in northern Minnesota which have been given complete protection have not shown an increase.

Fish.--By nature, Indians do very little sport fishing themselves, but they do derive

considerable income from the sale of special licenses and by serving as guides. On the Menominee Reservation in Wisconsin, where stream trout fishing is considered the finest in the state, a sizable income is derived from selling special licenses.

On a number of reservations in Minnesota and Wisconsin, which are located in the heart of the tourist country, Indians also receive considerable income from serving as guides during the summer months. Since many of them realize that this work is dependent on good fishing, the services of biologist of the Fish and Wildlife Service have been requested to advise them on their fishery problems. Biological surveys of the important waters in the Lac du Flambeau Reservation in Wisconsin are now underway. Fish parasite investigation on some of the Menominee Reservation lakes have also been started.

At the Red Lake Reservation in Minnesota, a large commercial fishery is operated and managed by Indians. Prior to the war they were removing approximately 650,000 pounds of game fish annually. This take was well below the limits of productivity of the lake, hence the annual catch was increased to one million pounds of game fish during the war. Whether the lake can continue to produce under this pressure remains to be seen but as yet no evidence of depletion has been noted. In addition to the game fish, approximately 250,000 pounds of rough fish have been removed annually. In harvesting the fish, restrictions are set upon as to size of mesh and footage of nets that can be used. At the present time the entire income on this reservation is derived from fishing, trapping, and timber. Within a few years the mature timber supply will be so depleted that the Indians will have to depend largely on wildlife and

subsistence farms for their support until a second timber crop is ready for harvesting. Some commercial fishing is also carried on by Indians living on reservations on the shores of Lake Superior. This fishing is done entirely under state regulations.

Small game.--Upland game birds, waterfowl, and small game mammals are hunted very little by Indians. Interest in hunting them is lacking because the amount of food received does not compensate them for the effort and expense involved. As a result of this lack of hunting pressure, small game is plentiful in many reservations in this region. This abundance has attracted non-Indian hunters and the increased hunting pressure brought on by them is forcing the Indians to realize that they must manage these species even though they do not utilize them themselves. Here again the Indians' concept

of wildlife as a utility and not as a source of recreation is clearly demonstrated.

Fur bearers.--The most successful approached for getting action programs started in wildlife conservation has been through the medium of the fur-bearing animals. Interest in them is paramount because the pelts produce an economic return and the carcasses of many can be utilized for food. All species of fur bearers are trapped, but from the standpoint of greatest monetary returns, the muskrat and beaver are the most important.

In general, Indians are poor trappers and are very careless with pelt preparation. This is contrary to the general impression that they are "naturals" in this field. Three facts have been responsible for this situation: a lack of suitable equipment for trapping and pelt preparation; an insufficient knowledge of trapping and pelt preparation

techniques; and a natural tendency to do things the easiest possible way.

The trapping seasons on many reservations starts in August and closes as late as June. The late season catches resulted in the taking of a high percentage of pregnant females and most of the early caught animals had unprime pelts of small size and of low quality.

Most animals were obtained by those methods requiring the least amount of effort. In some instances this meant they were taken either by spearing, shooting, or trapping. When traps were used, the common practice was to run long lines and to make infrequent visits to them. Oftentimes, dogs were used as aids in catching fur bearers, especially mink.

Before instructions were given, the care of the pelts was inferior to those prepared by non-Indians. Very little fleshing was done, and as a result much fat and flesh were left on the skins. Poorly-constructed

stretchers of varied sizes and shapes were also used and poorly-prepared pelts have been responsible for the low prices. This fact, coupled with the Indian's desire to get cash immediately for his pelts, has made him the victim of unscrupulous fur buyers.

Beaver. On the Cheyenne, Rosebud, and Pine Ridge Reservations in South Dakota, a system of regulating the beaver take has been in effect during the past 4 years. Under the permit systems adopted, the beavers have increased to the level where they can be harvested in comparatively large numbers on a sustained yield basis. The Cheyenne River method will be discussed here as it represents the best of the three systems followed.

The tribal council on the Cheyenne Reservation issued 49 paid permits during the 1940-41 trapping season and 137 beavers were harvested. The number allowed each permittee was unlimited. In the 1941-42 season 49

permits were issued and 128 animals were trapped although only 5 were allowed per person. Under the same regulations 117 were taken by 63 permit holders in the 1942-43 season. However, more drastic regulations were put into effect the following season, 53 permits were issued and 163 beavers were trapped. Under the same restrictions in the 1944-45 season 69 permits were issued and 193 beavers were taken. Accurate records of the annual beaver harvest for the past four seasons have been possible because all skins must have state metal tags affixed by Indian Service or tribal council officers before they can be legalized. When they are tagged an exact record of where they were trapped is obtained. These records have made it possible to mark the annual catches on a map and determine where the greatest beaver production is taking place. Areas that are not holding up can be detected and closed to trapping if

necessary. This regulated beaver cropping system is undoubtedly one of the best yet devised and has the following advantages: (1) reduces the sale of illegal furs to a minimum; (2) brings a better financial return to the Indians; and (3) provides an excellent system for recording the distribution of the catch.

Grand Portage in Minnesota has inaugurated a closed season on beavers for a 5-year period. Beavers have been restocked in the depleted parts of the reservation from outside sources or have been transplanted from areas of abundance within the reservation. Within a few years a managed beaver trapping program will become effective on this area.

Muskrat. On the Bad River Reservation in northern Wisconsin, a muskrat management project, known as the Bad River Muskrat Enterprise, has been in operation since the fall of 1942. This enterprise is patterned after the well-known projects near The Pas in

Manitoba, Canada. The entire 10,000-acre marsh of this project was closed to trapping in December 1942, when it had a population of approximately 5,000 animals and was opened to trapping for the first time in November 1944, with an estimated 20,000 population. Under a 50-50 share-cropping system only 1,500 muskrats were taken during the 1944-45 season because of the shortage of trappers caused by the war. Approximately 2,400 have been trapped to date during the present open season.

Under the plan of operation, the marsh is divided into areas and the trappers either choose an area or draw lots if others want the same place. Catch and grade records are also kept for each one of these units. Most of the traps used are of the "stop-loss" type which makes it possible to reduce losses by "wringing-off" to a minimum.

All of the trapped animals are brought to a centrally-located fur house where they are skinned, fleshed, and dried. This makes it possible to give close supervision to all of the operations performed and high quality pelts result. Excess fat and flesh are removed from the pelts by placing them on fleshing boards and scraping them with a dull knife. For shaping and drying, the pelts are placed on uniformly-shaped wire stretchers which are provided by the enterprise. A receipt is issued for the daily catch when the pelts are turned in for drying. They are then brought to the adjoining drying room and hung up on separate drying lines, the number of which corresponds with the trapping area. After the pelts have dried slowly for about one week, they are removed from the stretchers, perforated with a fur marker, and graded. The furs are graded weekly and the

trappers are then paid according to current market prices.

They are then baled and shipped to a fur auction company to be sold. Muskrat furs that are now reaching the market from this enterprise are considered to be among the finest in the country.

On the Turtle Mountain Reservation in North Dakota, the tribal council, through its sales association, has been buying fur from Indian trappers since the fall of 1944. The plan followed is to pay the local market price for furs and to sell them for more money in large lots through auction companies. All profits made are returned to the trapper on the basis of the number of pelts sold.

"Stop-loss" traps and wire stretchers are now being used by most of the muskrat trappers. Numerous demonstrations on proper trapping and pelt preparation have resulted in

good quality skins not coming from the Turtle Mountain area.

CONCLUSION

Substantial progress has been made in the management of the wildlife resources on 8 million acres of Indian lands in the Dakota and Lake States during the past 4 years, but much work still remains to be done. Due to the Indians' concept of wildlife as utility rather than as a source of recreation, the greatest interest has been shown in the management of their fur-bearing animals. Regulated seasons, fur enterprises, marketing cooperatives, and stocking programs are all examples of the advancements made in fur management on these lands. Conservation through visual education has been well received by both school children and adults. A sequence of this program should be adoption of a standardized course in conservation education for the children and an extension

program for the adults. Game regulations are now in effect on a number of reservations, but there are still many where no conservation practices are being followed.

81ST CONGRESS
1ST SESSION
(April 12, 1949)

PTA K

S. 1488

IN THE SENATE OF THE UNITED STATES

April 2 (legislative day, March 18), 1949

SEC. 2. A contract under this Act with respect to a tribe referred to in the first section shall--

(a) convey to the United States the title to all tribal, allotted, and inherited lands or interests therein belonging to the Indians of said tribe which are required by the United States for the reservoir to be created by the construction of the dam across the Missouri River in South Dakota, to be known as Oahe Dam, including such lands along the margin of said reservoir as may be required by the Chief of Engineers, United States Army, for the protection, development, and use of said reservoir;

(b) provide for the payment of--

(1) just compensation for lands and improvements and interests therein, including values above and below the surface, conveyed pursuant to subsection (a);

(2) costs of relocating and reestablishing the members of such tribe who reside upon such lands; and;

(3) costs of relocating and reestablishing Indian cemeteries, tribal monuments, and shrines located upon such lands;

(c) provide for reimbursement to the Bureau of Indian Affairs for reasonable costs actually incurred in relocating and reestablishing Government-owned buildings, facilities, roads, and bridges located upon such lands;

(d) provide adequate protection for the rights of individual members of such tribe who may refuse to join in the approval of the said contract;

(e) provide for the preservation of treaty rights of the tribe and the rights conferred by the Act of June 18, 1934 (48 Stat. 984), in regard to fishing, hunting, and trapping insofar as is practicable under the physical conditions existing when the Oahe project is completed;

and

(f) provide for nonexclusive access rights to the Oahe Reservoir and for reservation of the use of the land between the water line and the taking line to the said Indians so far as may be consistent with the operation and control of the Oahe project.

81st Congress
1st Session
(July 13, 1949)

House of Representatives

Report No. 1047

Page 3

	<u>Cheyenne River</u>	<u>Standing Rock</u>
	Acres	Acres
Trust allotments	24,868.87	46,116.73
Tribal lands	70,650.09	8,782.69
Non-Indian lands	<u>18,191.30</u>	<u>12,347.04</u>
	113,710.26	67,247.04

Page 4, ¶ 8

The Indians of both reservations will lose valuable wildlife resources and recreational areas. On the Cheyenne River Reservation, over 400 deer are estimated to live year long in the timbered area which will be inundated. In the bottoms area, pheasants, rabbits, and raccoons are numerous. Several hundred bank-denning beaver are annually taken

from the same area. Wildlife which provides important feed for over 100 families will be lost. On the Standing Rock Reservation it is estimated that approximately 600 white-tailed deer and 100 mule deer use the bottom land year long. Practically all pheasants, numbering thousands, which occupy a strip of land 10 miles wide out from the Missouri River, spend the winter months on the bottom-land area. The cottontail rabbit population of this area is also large. Thus on both reservations, valuable recreational areas used for trapping and hunting will be lost. Fishing is not important on either reservation at the present time.

NOV 18 1992

OFFICE OF THE CLERK

No. 91-2051

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

STATE OF SOUTH DAKOTA IN ITS OWN
BEHALF, AND AS PARENS PATRIAE,

Petitioner,

v.

GREGG BOURLAND, PERSONALLY AND AS CHAIRMAN
OF THE CHEYENNE RIVER SIOUX TRIBE AND
DENNIS ROUSSEAU, PERSONALLY AND AS DIRECTOR
OF CHEYENNE RIVER SIOUX TRIBE
GAME, FISH AND PARKS,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

JOINT APPENDIX--VOLUME TWO

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96 Cong. Rec. 15609 (September 22, 1950)

Mr. CASE of South Dakota. . .

Hunting and fishing rights also were a part of the rights recognized by treaty in 1851 and 1868 and ratified by the Congress. To the extent that these may be impaired or destroyed, the tribe is entitled to compensation apart from settlement with the allottees holding individual tracts of land.

The building of the dam in question, the Oahe Dam, not only floods out the Missouri River, but backs water far up its tributaries, the Cheyenne, Moureau, and other streams. This floods out the bottom lands on these tributaries which have provided winter feed and shelter for tribal herds and for the cattle of operators to whom the uplands have been leased for summer grazing.

Everyone who runs cattle in the West knows that the value of summer grazing lands

depends in part upon the availability of winter feed. The destruction of the bottom hay lands creates a tribal loss for which simple payment for the lands themselves is not equitable compensation. So, this bill, already approved by both House and Senate, establishes a procedure for negotiating a just and equitable settlement.

MEMORIAL

To The 83rd Congress

In Regard To

OAHE PROJECT

SOUTH DAKOTA

S. 695 AND H.R. 2233

PRESENTED BY

THE NEGOTIATING COMMITTEE

OF THE

CHEYENNE RIVER SIOUX TRIBAL COUNCIL

[p. 35, 4, 5]

We are convinced that the time must come when the American Indian will cease to be the ward of the United States. We recognize that appropriations for Indian Service and Treaty compliance have increased year by year until it now reaches amounts that were unthinkable fifty years ago. It is our experience that

the enlarged appropriations have not resulted in the development, the education and the civilization of our Indian people, to which they are entitled.

We have set out fully and we think we have shown conclusively that the Sioux Tribe of Cheyenne River Reservation should be placed in position to take over their own affairs and ultimately be released as wards of the United States. The pending Oahe bills, as introduced, should be passed by the Congress.

REPORT NO. 138

DAMAGE
to
INDIANS OF FIVE RESERVATIONS
from
THREE MISSOURI RIVER RESERVOIRS
in
NORTH DAKOTA AND SOUTH DAKOTA

UNITED STATES DEPARTMENT OF THE INTERIOR
BUREAU OF INDIAN AFFAIRS

Missouri River Basin Investigations Project
Billings, Montana

April 1954

Page 77, ¶ 2 & 3
Page 78

On the basis of the Fish and Wildlife Service values, wildlife losses on four reservations will amount to \$175,470 annually, table 24. This amount is based upon sportsmen's expenditures at the general level of prices which prevailed during 1939-44. Sportsmen's expenditures reflect the amount sportsmen are willing to spend to bag the

various species of game. Examples of these prices on 1939-44 base are: deer \$100; antelope \$75; waterfowl, pheasants, and grouse \$5; and rabbits \$1. Under the price projection now being used by Federal agencies in project planning reports (farm prices at 215 percent of the 1910-14 average) these prices are increased 36 percent--\$136 for a deer, \$102 for an antelope, etc.

The value of game to the Indian people undoubtedly is less than the amount sportsmen spend for hunting game. Reservation Indians probably are more skilled hunters than the average sportsman, use less costly equipment, and no hotel bills or long distance travel are incident to their hunting activities. Sportsmen's expenditures therefor are not considered a sound basis for arriving at the value of game to Indians. The loss to Indians from destruction of wildlife is taken to be the value to them of the annual wildlife

harvest which they obtain. This value may be measured by the additional amounts which Indians will have to pay for food to replace that previously supplied by the destroyed wildlife resources. Estimated values for each reservation are shown in the bottom portion of table 24. They reflect the increase in store bills which will result from the loss of game for food. Fur values are based on the market prices of these furs at 1939-44 price level. These are the prices used in the Fish and Wildlife Service reports.

Table 24. Annual Loss in Wildlife Values Expected to Result from Flooding of Indian Lands on Five Reservations

Reserva- tion	Big Game	Up- land Game	Fur Animal	Water Fowl	Total	Per Res- ident Family
	—	—	—	—	—	—
	\$	\$	\$	\$	\$	\$

Loss: Computed by Fish & Wildlife Service 1/

Standing Rock	17,200	35,000	8,100	0	60,300	
------------------	--------	--------	-------	---	--------	--

Cheyenne River	30,600	32,000	11,700	0	74,300
Crow Creek	408	16,055	1,141	4,238	21,842
Lower Brule	355	13,987	994	3,692	19,028

Four Reservations	48,563	97,042	21,935	7,930	175,470
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Estimated Loss to Indians 2/

Standing Rock	8,600	10,500	8,100	0	27,200	40
Cheyenne River	15,300	9,600	11,700	0	36,600	61
Crow Creek	204	4,816	1,141	1,271	7,432	30
Lower Brule	178	4,196	994	1,108	6,476	55
Four Reservations	24,282	29,112	21,935	2,379	77,708	47
Fort Berthold 3/	25,600	8,100	7,000	0	40,700	110
Five Reservations	49,882	37,212	28,935	2,379	118,408	59

1/ Data for Standing Rock and Cheyenne River Reservations are from "A Report on Fish

and Wildlife Resources in Relation to the Water Development Plan for the Oahe Reservoir," Fish and Wildlife Service, January 1951. This report contains separate estimates for Cheyenne River and Standing Rock Reservations.

Data for Crow Creek and Lower Brule Reservations are from "A Preliminary Evaluation of the Effect of the Fort Randall Reservoir on Fish and Wildlife Resources," Fish and Wildlife Service, February 1948. Data for Crow Creek and Lower Brule are 8.15 and 7.10 percent respectively of the total for the Fort Randall Reservoir, which represent the percentage of Indian land in the reservoir area.

2/ Values for big game are approximately 25 cents a pound live weight or 50 cents a pound locker-dressed weight. Values of upland game and waterfowl average around

\$1.50 per bird--50 cents to 75 cents a pound, and for rabbits 30 cents a head. These values are approximately 50 percent of the 1939-44 sportsman's value of big game and 30 percent of the value of upland game and waterfowl. Fur values are the same as those used in the Fish and Wildlife Service reports, namely, the 1939-44 average market value of the furs.

3/ Data for Fort Berthold are based on 1949-53 average take as reported in annual reports of the Branch of Forest and Range Management, Bureau of Indian Affairs. The value of fur-bearing animals is an unpublished estimate of the Fish and Wildlife Service.

Hearings Before the Committee on
Interior & Insular Affairs
Joint Senate and House Subcommittee
on Indian Affairs (5/19/54)

H.R. 2233 and S. 695

[pp. 117-119]

Mr. Berry. There is one more thing that I would like to proceed with just a little bit further. I think we should have a definite understanding, and I think that you owe this to the committee to give us, and to Indians, to give us a definite idea on whether you intend to buy this land, fee simple, or whether you are planning to acquire flowage rights or just what you intend to do so far as Oahe Dam is concerned.

Mr. Kimbell. I do not know whether I should make an answer directly on that question for the Department without going back and checking with my superiors, Mr. Chairman. I have some firm personal feelings on the

subject and I might say that for the benefit of the committee.

Mr. Berry. Do you not think it is fundamental to this bill?

Mr. Kimbell. That we would be satisfied with a flowage easement on the Indian lands, if that is what the committee feels is the fairest thing for the Indians. We can operate with that. That is my personal feeling. I would have to check that with my superiors to be able to say that is the position of the Department.

Mr. Berry. And that would apply throughout the entire reservation area, is that correct?

Mr. Kimbell. Now you are injecting, are you not, a question as to the -- there are a few scattered tracts of non-Indian land within that reservation area and you are asking, would we be agreeable to acquiring that land in fee, say, from the non-Indian owner and

then conveying the fee to the Indian subject to a reservation of flowage easement by the United States, is that what it would amount to?

Mr. Berry. If you could best handle it that way.

Mr. Kimbell. In order to do that, to do what I think you are asking, that would be the mechanics that we would go through, I believe.

Mr. Abbott. The question, perhaps, that is raised, Mr. Kimbell, by the injection of this flowage easement possibility here, with your understanding of the lengthy negotiations and the impact on the economic, agricultural units of these people, you would concede that it will make a great deal of difference whether that flowage easement there is applied or if the fee easement there is applied?

Mr. Kimbell. That is quite right and it should make a great deal of difference on the compensation that they are entitled to.

Mr. Abbott. The next question would be that and it would reflect directly on the amount of compensation. So that care would have to be taken to determine whether or not a few people are going to benefit from those flowage easements or whether all of those persons who are relocated would have an opportunity to benefit from those flowage easements.

Is it not true it would rather considerably reflect on the total damages involved?

Mr. Kimbell. That is quite right and this question is one that we have not as yet resolved definitely with the Department of the Interior as to what the two departments feel would be the best thing to do.

Hearing of the
Committee on Interior and Insular Affairs
Subcommittee of the Committee on
Interior and Insular Affairs of
the United States Senate;
Subcommittee of the Committee on
Interior and Insular Affairs of the
House of Representatives

S.695

Acquisition of Lands for Oahe
Reservations and Indian Rehabilitations

Thursday, May 20, 1954

Page 150

Senator Watkins. Do you have any considerable amount of acreage in fee patent in that area?

Mr. Fuhriman. It is relatively small. I don't have the exact figures.

Mr. Ducheneaux. A very small acreage, fee patent land.

Mr. Sigler. The Department's recommendation is based entirely on a matter of principle, that an Indian who has been

declared competent, who has received a fee patent to this land, is a competent Indian, and if he wants to buy additional land somewhere else there is no reason why he should take it in trust.

Senator Watkins. I will agree with you on that.

Page 159

Representative Berry. Here are some figures on the fee patent land we were asking about a while ago. There are eight tracts, embracing approximately three thousand acres.

Senator Watkins. That is all the fee patent land you have?

Mr. Kimbel. That is all that is in the taking area.

Page 160

Senator Watkins. I have had some experience, not in taking Indian lands, but in taking lands from the ordinary American people, the while [sic] people. It is quite

different. There are no indirect damages, and, of course, no rehabilitation money either for them. We just take it, and they have to go out and buy it somewhere else if they can find it somewhere else.

Page 186

Mr. Case. All we want is information. We feel slighted and neglected that we haven't been advised of this joint policy, that does affect the Oahe taking line. And we are competent to go ahead. We have made a bargain. We have offered our bargain right here. We will take so much money for so many acres of land, and give you the fee title.

Page 205

Mr. Ducheneaux. And I also want to introduce the article.

Representative Berry. Let's just take this page. It is page 28 of the April 18, 1953 issue, and it will be made a part of the file.

Mr. Ducheneaux: I also want to have [sic] go into the record, Mr. Chairman, "TVA Land Acquisition Experience Applied to Dams in the Missouri Basin," and that has been compiled by the South Dakota State College, which points out that the counties and the states have been reimbursed for their revenue losses. And that is [sic] what we are asking [sic] in these severance damages here. And we think that if the states and counties are paid for their loss of revenue, we should be paid for our loss of revenue.

Representative Berry. Of the tribe, that is, on the same basis as a municipal corporation?

Mr. Ducheneaux: And you will find that on page 39, I believe.

Mrs. Ducheneaux: That is tax revenue losses.

Representative Berry. It will be received and made a part of the file.

Page 264-268

Mr. LeBeau. Mr. Chairman, I would like to now refer to Section 2 of the bill, concerning the loss of wildlife, wild fruits and berries, and the loss of timber supply.

This morning, in the testimony given by the M.R.B.I., they testified to the fact that the Indians were losing such values as wild fruit, wild game, berries, and an annual loss of timber.

It is a custom among our Indian people and of other Indians all over the country to utilize whatever they can for a living, for subsistence. We utilize the wild game that we have there. We utilize the wild fruits and berries and also the timber.

I think I explained a while ago the general type of buildings used by the majority of Indians are constructed from native timber, logs; also livestock corrals and stock shelters, posts, sheds, are all constructed

from these poles and logs harvested from these various types of timber, native timber. Also, all of the fuel used for heating and cooking purposes is derived from native timber.

And because of the fact that the timber is there, we have wild fruit and wild game and wild berries which we can utilize.

Our estimation of that is based on the M.R.B.I. report. They stated that they are a fact-finding board furnishing facts as much as possible, and in much of our evidence we relied on their reports.

We had stated a part of their report in our Memorial. On page 19 of the Memorial there is a quote on non-cash subsistence values. There is explained there that native timber is their principal source of fuel, corral poles, and house logs, and also the value, the estimated value, of that timber, the use value to the Indians.

It also explains that wild fruit and wild game use by the Indians.

The figures shown on page 20 show the loss of wildlife resources, which was taken from the report of the Fish and Wildlife Service in Billings, Montana in January of 1951. The value of this loss of wildlife resources was placed at \$74,300 annually.

Because of the fact that we are losing these resources forever, we have capitalized that sum at 4 per cent to arrive at our value. And that value is a part of Section 2 of the bill.

Representative Shuford. What does that amount to in dollars and cents? You say it is included, but what is the actual value that you placed on it?

Mr. LeBeau. That is included in the \$6 million quote on page 3 of the bill.

Mrs. Ducheneaux. On the back of the Memorial I think there is a reference to that.

Mr. Case. On page 27.

Representative Shuford. \$1,857,500.

Mr. LeBeau. Yes. The other two totals there on that page are the loss of timber supply and the loss of wild fruit and wild game.

I have taken that figure in the M.R.B.I. report and capitalized on it. That is the way we arrived at the totals.

Representative Shuford. What does your wildlife consist of?

Mr. LeBeau. It consists of deer, beaver, rabbits, pheasants, and other small game that we have there.

Representative Shuford. You do not think you lose it completely, do you? Will they not move out from down below and go up on to higher ground?

Mr. LeBeau. The type of wildlife that inhabits those timbered bottoms could not live on the uplands.

Representative Shuford. The deer could not live on the uplands?

Mr. LeBeau. No. There are antelope on the uplands. We haven't considered them. This is a type of deer, though, that I believe it has been proven by experience in the Fort Peck Reservoir in Montana --

Representative Shuford. Is it a white-tailed deer?

Mr. LeBeau. Yes. -- that it could not survive on the uplands without shelter.

Representative Shuford. Not the type of Virginia deer, is it? A small deer, is it?

Mr. LeBeau. I wouldn't know what type of deer you have in Virginia.

Representative Shuford. Now, as to the pheasant you would lose, is that the ring-neck?

Mr. LeBeau. That is right.

Representative Shuford. They will move up into the uplands, will they not?

Mr. LeBeau. They will not survive on the uplands during the winter. They have to have shelter. Because of the loss of that shelter, they will not survive.

Representative Berry. There is very little farmland on the upland there, and very little feed.

Mr. LeBeau. The only type of wild birds that survive there are the native what we call prairie chickens, the grouse. They survive on the uplands.

Representative Shuford. I believe you speak about your wild fruit. That is not too important, it seems. You do not lay too much stress on that.

Mr. LeBeau. They do use it.

Representative Shuford. They do use it; but you do not have too much of it there. What does that consist of?

Mr. LeBeau. That consists of plums, choke cherries, currants, and sand cherries.

Representative Shuford. Blackberries?

Mr. LeBeau. No, we have no blackberries. Wild gooseberries and grapes.

Representative Shuford. Are those fox grapes?

Mr. Case. No, they are the bunch type.

Page 287-289

Mr. Case. . . Now, Section X of the bill is much more important and should have more detailed explanation than I can possibly give it now. Section X is in regard to the right of access to the shore line, and provides that after the gates of the dam are closed and the waters impounded, the tribe and the members shall have the right to graze stock on the land between the level of the reservoir and the taking line described in Part II thereof.

This has been a subject of more or less confusion, since we learned about the division of the lands to be taken into fee patent and flowage easement rights. The matter is not

entirely clear and should have further explanation, either as to what the Corps of Engineers in the Department are going to do, whether they should adopt a new policy or whether they will ask the Congress to proceed with the enactment of this bill.

Representative Berry. Would you yield at that point?

Mr. Case. Yes.

Representative Berry. My suggestion would be that either it be in the bill or in the report that in the event fee title is taken in the Government, which it will be, the tribe be given the leasing, the authority to lease that area, the taking area, for the benefit of the Army Engineers, if it is going to be held by the court.

And I am not sure whether that should be an amendment to the bill, or what. But I do think that the rights of the property on the reservation can only be protected in the event

that the tribe has the leasing of that land, if the Corps of Engineers intend to hold that land and use it for leasing purposes.

Now, I don't know whether that should be an amendment to the bill or whether it should be an understanding.

Mr. Case. It had better be an amendment to the bill, because other than that, these understandings fade as time goes on, and they are always the source of disputes. So I believe that this perhaps will accomplish that purpose. That gives the right of access and the right to graze cattle on that strip between the water level and the taking line. And correspondingly, the same section relates to the right of free access, including the right to hunt and fish on the shoreline of the reservoir, subject, however, to regulations governing the corresponding use by other citizens of the United States.

Now, the right to hunt and fish is a tribal right. It is still preserved and is still holding. No white citizen of South Dakota can go on this reservation and hunt unless he has first obtained a license from the Tribal Council. Our right to continue hunting and fishing is to us an extremely valid and valuable right. It is an ancient right. It is all that is left of our lives as they existed a hundred years ago.

83d Congress
2d Session
(July 23, 1954)
House of Representatives

PTA T

Report No. 2484

(Page 5)

Both the Interior and Army Departments were willing to grant severence [sic] damages for the loss of timber, wildlife, and wild product resources. The tribal negotiators asked for \$8,316,092 to cover expenses involved in this category, broken down as follows:

A. Grazing permit revenue loss	\$4,014,467
B. Loss of timber supply	2,444,125
C. Loss of wildlife, wild fruit, etc.	<u>1,857,500</u>
Total	8,316,092

The controversial figure for grazing permit loss was determined by a very careful calculation in which major consideration was given to the unwillingness of livestock companies to pay the former grazing fees due to insufficient river frontage and lack of access to protection and winter feed presently afforded in river bottoms.

Following lengthy hearings before the Joint House and Senate Subcommittee on Indian Affairs and later before the House Subcommittee on Indian Affairs, the tribal negotiating committee agreed to restudy its requests for compensation. Subsequently, these figures were, in most cases, scaled downward and resubmitted as follows:

I.	Land, timber, and improvements:	
A.	Land, tribal, allotted, assigned, Indian fee patent, and irrigation potential	\$1,940,223.83
B.	Stumpage value, standing timber	308,178.33
C.	Severance damages to individual owners	40,303.74
D.	Improvements, less tribal hospital	<u>326,073.05</u>
	Total	2,614,778.95
II.	Tangible future damages:	
A.	Grazing permit revenue loss	2,226,701.00
B.	Loss of timber supply	689,625.00
C.	Loss of wildlife, wild fruit, etc.	<u>1,056,750.00</u>
	Total	3,973,076.00
III.	Rehabilitation and reestablishment:	
A.	Repayment cattle	

	program	1,797,000.00
B.	Domestic water supply	300,000.00
C.	Farm program	150,000.00
D.	Land purchase program	-----
E.	Off-reservation rehabilitation program	297,500.00
F.	On-reservation rehabilitation housing program	500,000.00
G.	Rehabilitation road program	-----
H.	Educational loan program	800,000.00
I.	Tribal welfare program	2,000,000.00
J.	Business enterprises	<u>200,000.00</u>

Total	6,044,500.00
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Total damages sought:

I.	Land, timber, and improvements	2,614,778.95
II.	Tangible future damages	3,973,076.00
III.	Rehabilitation and reestablishment	<u>6,044,500.00</u>

Total	12,632,354.00
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(Page 13, ¶ 3)

Fourth, it is recommended that section IV be revised to stipulate that the United States agrees to make available the funds necessary to maintain the services and to supplant appurtenant facilities presently provided the Indians in a manner to meet their needs

existing at the time Oahe Dam is closed: the methods and means of meeting such needs to be based upon a thorough study of all feasible courses open to fulfill this obligation. This recommendation is based upon the fact that closure of Oahe Dam is 6 to 8 years in the future. During this period of time the situation of the Indians may change appreciably, particularly in view of the national policy of terminating special Federal services of a public nature to Indians by transfer of responsibility for such services to the States and their local subdivisions.

100 Cong. Rec. 13160 (August 3, 1954)

Mr. Berry. Mr. Speaker, while this does not involve too great a sum of money, it is, in my judgment, one of the most important bills to come before this Congress at this session, because it demonstrates a trend in the program of this administration to put more business in Government and get the Government out of as much business as possible.

The Indian Affairs Subcommittee of the great Committee on Interior and Insular Affairs, have spent more than 123 hours in holding hearings and studying the problems of the various Indians and tribes of Indians in the United States. In addition to that, we have visited a dozen reservations with a view of getting a first-hand knowledge of the conditions and needs and desires of these tribes.

This Congress has already passed legislation which will terminate the Federal supervision over six groups of Indians, and I stress the point that in every instance the Indians themselves have either asked for this terminal legislation and have helped to work out the terminal program, or have given their assent to it.

The first bill we passed authorized withdrawal of Federal supervision over the Indians of Wisconsin involving more than 3,300 Indians. The next withdrew supervision over 4 tribes of Indians in Utah involving 360 Indians. Today we have passed withdrawal bills over tribes in western Oregon involving 2,100 Indians. Another bill authorized withdrawal over the Alabama and Coushatta tribes of Texas involving 600 Indians, as well as part of the Uintah and Ouray Reservations in Utah involving 439 Indians, and the Klamath in Oregon involving 2,000 Indians.

The bill before us now is a bill which authorizes settlement for land damages on the Cheyenne Indian Reservation of the Sioux Tribe of South Dakota and authorizes a rehabilitation program for these people, to put them in shape to where in a period of 10 or 15 years they, too, will be ready to throw off the shackles of Federal supervision.

As I stated, this legislation provides settlement with the Indians for 104,420 acres of the best bottomland on this reservation consisting of 1,614,682,000 acres of Indian-owned land. The Government is taking this land for a reservoir back of the Oahe Dam on the Missouri River. The Oahe Dam is 1 of 4 large earthen dams to be constructed on the main stem of the Missouri River in North and South Dakota, to provide flood control for the basin States below Yankton and Sioux City. With Fort Peck, these dams are intended to store flood waters, to generate power for the

area, and to furnish some irrigation and some navigation below Sioux City, Iowa.

The Missouri River development program is a tremendous program involving a basin which embraces one-sixth of the entire continental United States, but more than that, it involves the lives and future of many hundreds of Indians, 2,540 of whom live on this particular reservation. There are 4,360 Indians enrolled here, 2,540 living here, constituting 575 families of which 200 families must be removed from the taking area.

When these 200 families are moved back and crowded into the remaining area, it will disrupt the present living of the entire group. In order to make it possible for those who are presently living on lands not being covered, to be able to assimilate the 200 families removed from the taking area and make it possible for them to get their feet on the ground and become assimilated into the balance

of the reservation, the subcommittee worked out a program of rehabilitation. This program is intended to assist part of them to go into the livestock business; build up their homes and ranch units; some of them to go into farming; some of them to be trained through vocational training and higher education which will be financed out of this rehabilitation program. Some can go into business enterprises either for themselves or be employed by someone else, which will help them get off the reservation where they cannot presently earn a living; and to become trained and located in a community where they can make a living, where they can raise their families and where they can become assimilated so that in 10 or 15 years this reservation will be in a position to come before the Congress and ask for termination of Federal supervision the same as the reservations that this Congress has already acted upon.

The subcommittee took into account the fact that there are many Indians on this reservation who are beyond the age of effective rehabilitation; it took into consideration the fact that there are many who cannot profitably be reestablished, and provided for those families a program of assistance. A program of welfare has been established from the interest on a \$2 million perpetual investment.

I refer you to the Committee report wherein the Indian program of rehabilitation for these people has been set out in detail. As an illustration of the good intention and desire of these Indian people to work out this program and to get the greatest results from it, they have asked that these funds be earmarked for these various purposes and be used for those purposes as nearly as possible. The Tribal Council of the reservation has spent many, many hours in working and planning

and studying to bring before this Congress the most efficient program possible. I hope that this Congress will see fit to go along with them and to help get them in shape, financially, and economically, and intellectually, so that they, too, may be able to get out from under the yoke of the Indian Department before too long.

Actually, the reservation itself receives no benefit whatever from the Missouri River Development Program. Actually, it takes from the reservation the best land, the winter protection for the livestock--the natural habitat of the Indian families--a great source of their revenue; it destroys their roads; their agency headquarters will be under 40 feet of water; it disrupts their homes, their schools, their churches, their hospitals; it disrupts their entire mode of living. Unless this program is approved, these people stand to suffer irreparable damage.

The Indians will be moved back up on to the open prairie without protection from the elements. Dams and cisterns will have to provide their water supply. Their way of life will be completely changed. If, however, this settlement program works out as the Indians and the subcommittee have set it up, these people will become established, part of them will be relocated off of the reservation and all of them will be placed in shape to handle their own affairs without supervision from the Indian Department in a period of possibly 10 or 15 years.

CONGRESSIONAL RECORD - HOUSE

COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE
100 Cong. Rec. 13152 (August 3, 1954)

Sec. II. The United States agrees to pay for all said tribal, allotted, assigned and inherited lands or interest in land, together with all improvements thereon (except the Agency Hospital); and for the stumpage value of standing timber and for severance damages to individual owners within the taking area; and for the bed of the Missouri River so far as it is the eastern boundary of said Cheyenne River Reservation, the sum of \$2,614,778.95. And the United States further agrees to pay for overall tribal severance damages outside the taking area for Oahe Reservoir and for the loss of the annual supply of timber and for the loss of wildlife and wild fruits, the sum of \$3,973,076, in all, \$6,587,854.95, which sum shall be in final and complete settlement

of all claims, rights and demands of said tribe or allottees or heirs thereof arising out of the construction of the Oahe project, and shall be deposited to the credit of said tribe in the Treasury of the United States, to draw interest on the principal thereof at the rate of 4 percent per annum until expended: Provided, That the said tribal council shall submit to the Secretary of the Interior for his approval a copy of the schedules on which the sum of \$2,614,778.95 is based, as itemized in this section, and when such schedule is approved by the Secretary of the Interior it shall be the final schedule on which the said sum shall be distributed to or credited to the owners of said lands.

HEARINGS
BEFORE THE
COMMITTEE ON INTERIOR AND INSULAR AFFAIRS
UNITED STATES SENATE

August 17, 1954

H. R. 2233

Page 3-4

What I am willing to recommend is that as far as I am concerned, we have had hearings on it, we have a hearing record; the full damages for the taking, full compensation, is for \$5,384,000.14 and that is worked out in connection with their various claims and appraisals. It is higher than either the Army Engineers' appraisal or the MRB, which is the Missouri River Board appraisals, set up by the Department of the Interior. It is higher than that but it is considerably lower than the Indians think they ought to have. This takes

care of severance damage, it takes care of all the elements of value in the property. I wanted it in one lump rather than to take the direct benefits and then the indirect benefits, because the Army said the indirect benefits they were claiming were actually duplication and instead of paying for the compensation that they were entitled to, they were doubling it up. In addition, they should have some money because they are in pretty bad condition and that would be used for rehabilitation purposes.

I thought we would follow somewhat the same schedule we followed on the Navajos.

100 Cong. Rec. 14979 (August 18, 1954)

Mr. WATKINS. With respect to the appraised value of the land being taken for this project, I am advised the Army engineers' report did not take into consideration any severance damage. There is a case for severance damages in the project. One of the main portions of the claim is based on ownership of land on river bottom which is good for agriculture. It can be irrigated in time. It contains much timber. In addition, the Indians owned lands at a higher elevation. That land would not be worth nearly as much if there were taken away from them the bottom land where their livestock could be wintered. So there should be taken into consideration the severance damage.

I have had some experience in condemnation suits and right-of-way suits over the years, where lands had been used together

as are these two types of lands used by the Indians. In such case severance damage is involved. That severance damage had not been taken into consideration. The Army engineers gave the lowest appraisal. The Missouri river Investigation Board had the next highest, and the Indians gave the highest figures on the direct benefits. In addition, the Indians claimed \$6 million in indirect benefits. I felt that constituted a duplication in large measure of the values that had been given by the Army engineers. For that reason I was not willing to vote for a bill which recognized those indirect benefits. However, severance damages should be included with direct costs and damages. I included that in the tribal claim for the loss of fruits, timber and so forth, in the lower lands. Therefore, I felt the amount allowed for damage could be justified. The amount allowed for rehabilitation is largely based on a per

capita amount, the same as was given to the Navahos and Hopis.

Pub. L. No. 776, 68 Stat. 1191 (1954).

AN ACT

To provide for the acquisition of lands by the United States required for the reservoir created by the construction of Oahe Dam on the Missouri River and for rehabilitation of the Indians of the Cheyenne River Sioux Reservation, South Dakota, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this agreement between the United States of America and the Sioux Indians of Cheyenne River Reservation in South Dakota, Witnesseth, That this agreement when enacted by Congress and when confirmed and accepted in writing by three-quarters of the adult Indians of the Cheyenne River Reservation in South Dakota, as shown by the tribal rolls of the said reservation, does hereby convey to the United

States all tribal, allotted, assigned, and inherited lands or interests within said Cheyenne River Reservation belonging to the Indians of said reservation, which lands are required by the United States for the reservoir to be created by the construction of the dam across the Missouri River in South Dakota, now known as Oahe Dam, including such lands along the margin of said proposed reservoir as may be required by the Chief of Engineers, United States Army, for the construction, protection, development, and use of said reservoir all as described in part II of this agreement, subject, however, to the conditions of this agreement hereinafter set forth: Provided, That the effective date of this Act shall be the date when the Secretary of the Interior shall by proclamation declare that this agreement has been ratified and approved in writing by three-quarters of the

adult members of said Indians as above defined.

SECTION II. The United States agrees to pay, out of funds appropriated for construction of the Oahe project, as just compensation for all lands and improvements and interests therein (except the agency hospital) conveyed pursuant to section I of this Act; and for the bed of the Missouri River so far as it is the eastern boundary of said Cheyenne River Reservation, the sum of \$5,384,014; which sum shall be in final and complete settlement of all claims, rights, and demands of said Tribe or allottees or heirs thereof arising out of the construction of the Oahe project, and shall be deposited to the credit of said Tribe in the Treasury of the United States, to draw interest on the principal thereof at the rate of 4 per centum per annum until expended: Provided, That the said Tribal Council with the approval of the

Secretary of the Interior shall distribute the sum of \$2,250,000 in accordance with the revised appraisal of the Missouri River Basin investigation staff of the Department of the Interior.

SECTION III. The United States further agrees to appropriate, and the Secretary of the Army is authorized and directed to make available from sums so appropriated to be charged against the cost of construction of the Oahe project, further additional appropriations for the special purposes of relocating and reestablishing the Indian cemeteries, tribal monuments and shrines within the taking area for said reservoir described in Part II of this Act as the Tribal Council of said Indian Tribe shall select and designate, which sums shall be expended on the recommendation of the Tribal Council with the approval of the Secretary of Interior.

SECTION IV. The United States further agrees to appropriate, and the Secretary of the Army is authorized and directed to make available from sums so appropriated to be charged against the cost of construction of the Oahe project, further additional appropriations which shall be expended for the relocation and reconstruction of Cheyenne River Agency, relocation and reconstruction of schools, hospitals, service buildings, agents and employees quarters, roads, bridges and incidental matters or facilities in connection therewith.

SECTION V. In addition to the sum set out in section II hereof, the United States further agrees that it will appropriate and make available a further sum in the total amount of \$5,160,000 which shall likewise be deposited in the Treasury of the United States to the credit of said Indian Tribe to draw interest on the principal thereof at the rate

of 4 per centum per annum until expended for the purpose of complete rehabilitation for all members of said Tribe who are residents of the Cheyenne River Sioux Reservation at the time of the passage of this Act, whether or not residing within the taking area of the Oahe Project, and for relocating and reestablishing members of said Tribe who reside upon such lands conveyed to the United States to the extent that the economic, social, religious, and community life of all said Indians shall be restored to a condition not less advantageous to said Indians than the condition that the said Indians now are in: Provided, That said fund provided for in this section shall be expended upon the order and direction of the Tribal Council of said Tribe, with the approval of the Secretary of the Interior, for the purposes set forth in this section: Provided further, That the authorization contained in section XVI hereof

shall remain available for a period not to exceed ten years from the effective date of this Act.

SECTION VI. The United States agrees that all mineral rights of whatsoever nature at or below the surface within the taking area as described in Part II hereof shall be and hereby are reserved to said Indian Tribe or individual owners or holders of lands or interests in lands as their interests may appear under section I hereof, subject to future extraction and use by said Tribe or said members thereof or their heirs, successors, or assigns, but also subject to all reasonable regulations which may be imposed by the Chief of Engineers, United States Army, for the protection and use by the United States of the taking area for the purposes of the Oahe Dam and Reservoir Project.

SECTION VII. The members of said Indian Tribe shall have the right without charge to cut and remove all timber and to salvage any portion of the improvements within said taking area either by demolition or removal, and the owners of the land whereon said improvements stand shall have a prior right to such salvage but if said right is waived or not exercised before the date of the notice provided for in section IX hereof, the Tribal Council shall have the right to designate others to demolish or remove said timber and improvements or in the discretion of the Tribal Council, said demolition or removal may be undertaken and carried out by said Tribal Council: Provided, That the salvage permitted by this section shall not be construed as "double compensation" as set out in section 2(b)(2) of Public Law 870, Eighty-first Congress.

SECTION VIII. The United States and the Indian parties to this agreement recognize

that a hazard to livestock is created by the rise and fall of the waters to be impounded in Oahe Reservoir. They also recognize that said hazard is not subject to exact determination at this time, therefore the parties to this agreement agree that all hazards which may develop when the annual rise and fall of Oahe Reservoir can reasonably be determined shall be met by the United States by such protective measures as may be necessary to minimize losses to the Indian parties hereto as to livestock only.

SECTION IX. Members of said Indian Tribe now residing within the taking area of the project shall have the right without charge to remain on and use the lands hereby conveyed as said lands are now being used from and after the effective date of this Act to the point in time where the gates of Oahe Dam are to be closed for the impoundment of the water of the Missouri River. The Chief of Engineers shall

give public notice one year in advance of the prospective date of the closing of said gates for said purpose and all improvements of whatever nature, all timber of whatever kind or class shall be salvaged or removed or else shall be considered as abandoned by the Tribe or by the individual owners at a date six months subsequent to the date of the notice given by the Chief of Engineers. All individuals and personal property shall remove or be removed from the taking area before the expiration of the one year's notice given by the Chief of Engineers as aforesaid. And the United States shall not be liable for any loss of life or property not so removed from the taking area from and after the expiration of said notice.

SECTION X. After the Oahe Dam gates are closed and the waters of the Missouri River impounded, the said Indian Tribe and the members thereof shall have the right to graze

stock on the land between the level of the reservoir and the taking line described in Part II hereof. The said Tribal Council and the members of said Indian Tribe shall have, without cost, the right of free access to the shoreline of the reservoir including the right to hunt and fish in and on the aforesaid shoreline and reservoir, subject, however, to regulations governing the corresponding use by other citizens of the United States.

SECTION XI. The United States through the Department of Interior shall render all aid and assistance to individual members of said Tribe whose lands are within the said taking area for the purposes of purchasing land in the name of the United States for said individuals and the United States shall reconvey said lands under trust patent to the individual owners upon the selection by said owners of the land which they decide to have purchased for them. The said trust patents

shall be in form and effect the same as corresponding trust patents heretofore issued to said individuals. The holders of exchange assignments within the said taking area shall be regarded as holders of trust patents and shall be accorded the same privileges and procedures as holders of land held in trust as in this section provided.

The funds for the purchase of such substitute land in all cases shall be provided by the individual apply for such purchase and reconveyance as is herein described, out of monies placed to his credit for the transfer of his lands, improve ~~ments~~ and timber under the authority of this agreement and the subsequent Act of Congress herein provided for but no service charge shall be made by the United States in addition to the cost of the substitute allotment. The lands so selected and purchased as substitute allotments may be either within the boundaries of the Cheyenne

River Reservation as diminished by this agreement or outside said reservation as may meet the desires of the individuals involved in the several transactions: Provided, That no purchase of lands outside the Cheyenne River Reservation shall affect the existing status of such lands, interests or rights therein, or improvements thereon, with respect to taxation. No prior Act of Congress or Departmental regulation shall be held to be a bar to the full operation of this section, nor shall the Tribal Constitution, ordinance or resolution thereunder be held to be a bar to the full operation of this section, numbered XI.

SECTION XII. No part of any expenditure made by the United States under any or all of the provisions of this agreement and the subsequent acts of ratification shall be charged as an offset or counter claim against any tribal claim which has arisen under any

treaty, law, or executive order of the United States prior to the effective date of taking of said land as provided for in section I hereof and the payment of Sioux benefits as provided for in section 17 of the said Act of March 2, 1889 (25 Stat. 888), as amended, shall be continued under the provision of section 14 of the Indian Reorganization Act of June 18, 1934 (48 Stat. 984), on the basis now in operation without regard to the loss of tribal land within the taking area under the provisions of this agreement.

SECTION XIII. The United States agrees to reimburse the said Tribal Council for expenses incurred by it and caused by, or incident to, the negotiations which have led up to the making and ratification of this agreement: Provided, That such reimbursable expenses do not exceed in the aggregate \$100,000, of which not more than \$50,000 shall be payable as attorney fees. The Tribal

Council shall send a statement to the Secretary of the Army setting out said expenses up to the date of the proclamation to be issued by the Secretary of the Interior declaring that the Act of Congress approving this agreement is in full force and effect. The Secretary of the Army shall forward said statement to the Congress for appropriation together with his recommendations.

SECTION XIV. Holders of inherited lands or interests in lands may consolidate their interests by and between themselves and the total proceeds in the hands of any individual held by such consolidation of interests may be used by any individual holder of the same for purchase of substitute lands as in section XI provided.

SECTION XV. The right of any individual member of said Indian Tribe to reject the final appraisal made on his land and improvements shall be preserved and, if any

individual does reject such final appraisal, he shall file notice of such rejection by notice in writing to the Chief of Engineers, United States Army, who shall thereupon file a proceeding in the United States District Court of the District of South Dakota as in a condemnation proceeding and jurisdiction is hereby conferred upon said Court to determine, by procedure corresponding to a condemnation proceeding, the value of said land and improvements and the said Tribal Council shall deposit with the clerk of said court the full amount set out in the final appraisal which was previously offered to said individual, which fund shall be used in payment in full or in part of the final judgment of said United States District Court. Cost of such proceedings shall be borne by the United States and the individual involved shall be entitled to counsel at his own expense. In the event the amount of the appraisal so

deposited in said Court is not enough to cover the final judgment in said proceeding, the United States shall pay such difference from the fund of \$5,384,014 established under section II, hereof, into the hands of the clerk of said Court and thereupon title shall vest in the United States.

SECTION XVI. There is hereby authorized to be appropriated not to exceed \$10,644,014, as provided by sections II, V, and XIII, exclusive of the sums to be charged against the cost of construction of the Oahe project as provided in sections III and IV hereof.

PART II

The lands conveyed by this agreement are the following tracts of land all in the State of South Dakota:

Township 5 north, range 30 east,
Black Hills meridian

Section 5: Northwest quarter northwest quarter northeast quarter; north half

northwest quarter; north half southeast quarter northwest quarter; northwest quarter southwest quarter northwest quarter.

Section 6: Northeast quarter northeast quarter; northeast quarter southeast quarter northeast quarter; north half northwest quarter northeast quarter; east half northeast quarter northwest quarter.

Township 6 north, range 29 east,
Black Hills meridian

Section 1: Lots 1, 2, 5, and 6.

Township 6 north, range 30 east,
Black Hills meridian

Section 28: Southwest quarter southeast quarter.

Section 33: Northeast quarter northwest quarter northeast quarter; southeast quarter northwest quarter.

Township 7 north, range 29 east,
Black Hills meridian

Section 21: All.

Section 34: Southeast quarter.

Township 7 north, range 30 east,
Black Hills meridian

Section 19: Lots 1, 2, and 3.

Section 20: Lot 1.

Section 29: Lots 1, 2, and 3.

Section 30: Northeast quarter northeast quarter; each half southeast quarter northeast quarter; north half northwest quarter northeast quarter; north half northeast quarter northwest quarter.

Section 31: West half northeast quarter; lots 6, 7, and 8.

Section 32: Lot 1.

Township 8 north, range 23 east,
Black Hills meridian

Section 1: Lots 5 and 6.

Township 9 north, range 23 east,
Black Hills meridian

Section 36: South half southwest quarter and lots 2, 3, and 4.

Township 9 north, range 24 east,
Black Hills meridian

Section 12: South half south half northeast quarter; northwest quarter southeast quarter; southeast quarter northeast quarter southwest quarter; east half southwest quarter southwest quarter; lots 2, 3, 4, and 5.

Section 13: West half northwest quarter; northwest quarter southwest quarter; lots 6, 7, 8, and 9.

Section 14: South half; south half northwest quarter; west half southwest quarter northeast quarter; east half southeast quarter northeast quarter.

Section 15: Southeast quarter northeast quarter; south half southeast quarter southeast quarter.

Section 22: North half northeast quarter northeast quarter; northeast quarter southeast quarter; southeast quarter northwest quarter southeast quarter; lots 2 and 3; lot 1 except ten acres in the form of a square situated in the northwest corner thereof.

Section 23: Northwest quarter; northwest quarter northeast quarter; lots 6, 7, 8, and 9.

Section 27: Lots 5, 6, 8, 9, and 10; lot 7, except ten acres in the form of a square, situated in the northwest corner thereof.

Section 28: South half southeast quarter; south half north half southeast quarter.

Section 31: Southeast quarter northeast quarter; lots 6, 7, 8, and 9.

Section 32: South half south half northwest quarter; lots 8 and 9.

Section 33: Lots 5 and 6.

Section 34: Northwest quarter southeast quarter northwest quarter; lots 1, 2, and 3.

Township 123 north, range 79 west, fifth principal meridian.

Section 24: Lot 4.

Section 25: Lot 1.

An unsurveyed island in the Missouri River situated opposite sections 3 and 4 of township 9 north, range 29 east, Black Hills meridian.

An unsurveyed island in the Missouri River, situated opposite sections 2, 3, and 4 of township 9 north, range 29 east of the Black Hills meridian, also sections 21, 22, and 23 of township 115 north, range 81 west of the fifth principal meridian.

An unsurveyed island in the Missouri River, situated opposite sections 1 and 2 of township 9 north, range 29 east, Black Hills meridian.

An unsurveyed island in the Missouri River, situated opposite sections 1 and 2 of township 9 north, range 29 east of the Black Hills meridian, also sections 23 and 24 of township 115 north, range 81 west and section 19 of township 115 north, range 80 west of the fifth principal meridian.

An unsurveyed island in the Missouri River, situated opposite sections 14, 15, 16, and 21 of township 10 north, range 28 east of the Black Hills meridian, also sections 33, 34 and 35 of township 116 north, range 82 west of the fifth principal meridian.

An unsurveyed island in the Missouri River, situated opposite sections 19, 29, 30, and 32 of township 10 north, range 29 east of the Black Hills meridian, also section 1 of township 115 north, range 82 west of the fifth principal meridian.

An unsurveyed island in the Missouri River, situated within section 12, township 12 north, range 30 east, Black Hills meridian, between Lafferty Island, a surveyed island, and the right bank of said Missouri River.

An unsurveyed island in the Missouri River, situated opposite sections 12, 13, 14, and 23 of township 12 north, range 30 east of the Black Hills meridian, also sections 29,

30, 31 of township 118 north, range 79 west of the fifth principal meridian.

An unsurveyed island in the Missouri River, situated opposite sections 22, 27, 28, and 33 of township 16 north, range 31 east of the Black Hills meridian, also sections 5, 6, and 7 of township 121 north, range 78 west of the fifth principal meridian.

An unsurveyed island in the Missouri River, situated opposite sections 14, 15, and 22 of township 16 north, range 31 east of the Black Hills meridian, also section 5 of township 121 north, range 78 west and sections 28, 32, and 33 of township 122 north, range 78 west of the fifth principal meridian.

The following described land is described in the foregoing reservation description, but is owned by Indian fee patents to individual Indians.

Township 9 north, range 24 east,
Black Hills meridian

Section 13: West half northwest quarter;
northwest quarter southwest quarter; lots 6,
7, and 9.

Section 14: East half southeast quarter.

Township 10 north, range 28 east,
Black Hills meridian

Section 10: South half southwest quarter.

Section 15: Lots 2 and 3.

Township 12 north, range 30 east,
Black Hills meridian.

Section 11: South half south half.

Section 12: South half south half
southwest quarter southwest quarter; lots 3,
5, and 6.

Section 13: Lots 1 and 2.

Section 14: North half; east half
northwest quarter southeast quarter; northeast
quarter southwest quarter southeast quarter;
lot 1; the north six hundred and sixty feet of
lot 2.

Township 14 north, range 31 east,
Black Hills meridian

Section 11: Lot 4.

Township 15 north, range 31 east,
Black Hills meridian

Section 3: Southwest quarter northwest
quarter; lots 1, 2, and 3.

Section 13: West half east half southeast
quarter southwest quarter.

Township 16 north, range 29 east,
Black Hills meridian

Section 17: North half northeast quarter
southeast quarter; east half northwest
quarter; north half northeast quarter
southwest quarter; northwest quarter northeast
quarter; north half southwest quarter
northeast quarter; southwest quarter southwest
quarter northeast quarter; northwest quarter
northwest quarter southeast quarter.

Section 18: East half southwest quarter
southeast quarter.

Section 19: Northeast quarter northeast
quarter.

Section 20: North half southwest quarter;
north half southwest quarter southwest
quarter; southeast quarter southwest quarter
southwest quarter.

Township 16 north, range 30 east,
Black Hills meridian

Section 7: East half east half.

Section 8: North half south half
northwest quarter.

Section 11: East half east half northeast
quarter; northeast quarter northeast quarter
southeast quarter; east half southeast quarter
southwest quarter.

Section 12: West half northwest quarter.

Township 16 north, range 31 east,
Black Hills meridian

Section 28: Northwest quarter; west half
northeast quarter; lots 1 and 2.

Approved September 3, 1954.

Page 1

(_____(Enrollment No._____))

As an adult Indian whose name appears on
the tribal rolls of the Cheyenne River
Reservation in South Dakota, you are eligible
to any whether you approve or disapprove
Public Law 776, 83d Congress. The major
provisions of the law are listed below.
Please mark X in one of the boxes below, sign
your name, and return the ballot to the
Superintendent of the Cheyenne River
Reservation not later than January 5, 1955.
If you cannot write, make a thumbprint for
your signature, have two other persons print
your name, and sign their own names as
witnesses.

Area Director

B A L L O T

_____ I approve Public Law 776, 83d
Congress.

_____ I do not approve Public Law 776, 83d
Congress.

Signature

The major provisions of Public Law 776 as follows:

1. The United States will pay to the Indian owners \$2,250,000 for the Indian lands taken for the Oahe Project. Each Indian who owns land in the taking area will receive slightly more than the amount of the appraisal on his land by the Missouri

River Basin Investigations staff. Any Indian who is not satisfied with the appraisal of his land may have its value fixed by the federal court, and any additional payment allowed by the Court will be taken from the fund described in the next paragraph.

2. The United States will pay \$3,134,014 for indirect damages caused by taking the Indian lands for the Oahe Project. This money will be spent in accordance with a plan prepared by the tribe and approved by the Secretary of the Interior.
3. The United States will provide \$5,160,000 for rehabilitating members of the tribe who were residents of the reservation on September 3, 1954. This includes members who lived inside the taking area and also members who lived outside the taking area, but does not include members who are not residents of the reservation.

4. Mineral rights will be kept by the Indian owners.
5. Timber and improvements may be removed from the taking area by the Indians.
6. Indians may graze livestock on the part of the land not flooded and may hunt and fish in the taking area without charge.
7. Indians whose lands are taken may use money paid by the United States to purchase other lands. Title may be taken by the United States in trust if the Indians so wish.
8. The United States will relocate and reconstruct the Cheyenne River Agency, schools, hospitals, service buildings, employee quarters and roads that are flooded.
9. The Indians may continue to live on the land to be flooded until the gates of the dam are closed.

Certificate of Election on Approval
of P.L. 775 (January 20, 1955)

CERTIFICATE

We the undersigned, a committee of two appointed by the Area Director of the Aberdeen Area Office and two appointed by the Chairman of the Cheyenne River Sioux Tribal Council for the purpose of counting and recording the votes of adult members of the Cheyenne River Sioux Tribe in connection with Public Law No. 776, 83rd Congress, hereby certify that we have counted all votes received up to 4:00 P.M. January 20, 1955 and that we verily believe that we have correctly identified each and every person who has submitted his ballot and that we have correctly recorded and tallied each and every ballot and that all of the ballots received have been tallied as follows:

1. For approval of P.L. No. <u>776</u>	1,790
2. For disapproval [sic] of P.L. No. <u>776</u>	143
3. Spoiled ballots, either not signed or vote not indicated	9
<hr/>	
Total ballots cast	1,942

We further certify that the list of eligible voters which was given to this committee contains the names of 2,375 persons and that the total number of favorable votes shown opposite "1" above is 75.35 percent of the adult members of the Cheyenne River Sioux Tribe who are eligible to participate in the ballot.

For the Bureau of Indian Affairs

/s/ Paul H. Dillon
Paul H. Dillon

/s/ George B. McKay
George B. McKay

For the Cheyenne River Sioux Tribal Council

/s/ Donald G. LaPlante
Donald G. LaPlante

/s/ William Lends His Horses
William Lends His Horses

Cheyenne Agency, South Dakota

January 20, 1955

CERTIFICATION

I hereby certify that this is a true and correct copy.

/s/ W.P. Hughes
W.P. Hughes, Acting Superintendent

PTA JJ

DEPARTMENT OF THE ARMY

Omaha District Corps of Engineers

6014 U.S. Post Office and Court House

Omaha, Nebraska 68102

9 March 1976

Mr. Michael B. Jandreau, Chairman
 Lower Brule Sioux Tribe
 Lower Brule, South Dakota 57548

Re: Tribal Hunting, Fishing and
 Trapping Ordinance

Page 5
 ¶ "e."

e. That the Ordinances of the Lower Brule Sioux Tribe have no force and effect over the lands formerly owned by the Tribe and its members which were acquired by the United States for the Ft. Randall and Big Bend Projects.

Exhibit 1

CONSTITUTION AND BY-LAWS
 OF THE CHEYENNE RIVER SIOUX TRIBE
 SOUTH DAKOTA

APPROVED DECEMBER 27, 1935

AMENDED FEBRUARY 11, 1966

AMENDED JUNE 18, 1980

CONSTITUTION AND BY-LAWS OF THE CHEYENNE
 RIVER SIOUX TRIBE OF SOUTH DAKOTA

PREAMBLE

We, the Sioux Indians of the Cheyenne River Reservation in the State of South Dakota in order to establish our tribal organization, to conserve our tribal property, to develop our common resources, to establish justice, and to promote the welfare of ourselves and our descendants, do hereby ordain and establish this constitution and by-laws for our tribal council as a guide to its deliberations.

ARTICLE--TERRITORY

The jurisdiction of the Cheyenne River Reservation Sioux Tribe of Indians shall extend to the territory within the original confines of the diminished reservation boundaries, which are described by the act of March 2, 1889 (25 Stat. L. 888), and including trust allotments without the herein mentioned boundaries and such other lands as may be hereafter added thereto under any law of the United States, except as otherwise provided for by law.

. . .

ARTICLE IV--POWERS OF SELF-GOVERNMENT

Section 1. The tribal council of the Cheyenne River Reservation shall exercise the following powers vested in the present council under existing laws or conferred by the act of June 18, 1934 (48 Stat. 984) and acts amendatory thereof as supplemental thereto, subject to any limitations imposed by the

statutes or the Constitution of the United States, and subject further to all express restrictions upon such powers contained in this constitution and the attached by-laws.

(a) To enter into negotiations with the Federal, State, and local Governments on behalf of the tribe.

(b) To present and prosecute any claims or demands of the Cheyenne River Sioux Tribe of Indians. It shall have the right to assist members of the tribe in presenting their claims and grievances before any court or agency of government. It shall have the right to employ attorneys of record or representatives for such services, the choice of counsel and fixing of fees to be subject to the approval of the Secretary of the Interior.

(c) To approve or veto any sale, disposition, lease or encumbrance of tribal lands, interests in land or other tribal assets which may be authorized or executed by

the Secretary of the Interior, the Commissioner of Indian Affairs, or any other official or agency of government, provided that no tribal lands shall ever be sold, except those tribal lands located outside of the Cheyenne River Reservation boundary, and outside of the Consolidation Area boundary lines established as of the date of the approval of Public Law 88-418 (August 11, 1964), and set out in tribal council action by Resolution No. 92-64 (September 2, 1964). Tribal lands may not be encumbered or leased for a period exceeding five years, except as provided for in Article VIII, Section 3.

(d) To confer with the Secretary of the Interior upon all appropriation estimates or Federal projects for the benefit of the tribe prior to the submission of such estimates to the Bureau of Budget and Congress.

(e) To receive voluntary relinquishments of allotments and heirship lands and to make

assignments of tribal land to members of the Cheyenne River Sioux Reservation in conformity with article VIII of this constitution.

(f) To select subordinate boards, officials, and employees not otherwise provided for in this constitution and to prescribe their tenure and duties and to establish district councils; to authorize and establish any association or organization having for its purpose and sole object the benefit of the members of the Cheyenne River Sioux Tribe. Such association or organization shall have the right to engage in collective or cooperative bargaining or marketing, or purchasing of supplies, crops, equipment, seed, machinery, building or livestock, the council reserving the right to establish ordinances covering the activities of such association or organization, and to enforce the observance of such ordinances.

(g) To administer any funds or property within the control of the tribe; to make expenditures from available funds for public purposes, including salaries or other remuneration of tribal officials or employees. Such salaries or remuneration shall be paid only for services actually authorized in a regular and legal manner and actually rendered. All expenditures from the tribal council fund shall be by resolution duly passed by the council to that effect and the amount so paid shall be a matter of public record at all times.

(h) The council shall have the power when just cause or extreme emergency exists, which shall create a hazard to the peace and safety of the tribe as a whole or to the individual members thereof, to require the individual members of the tribe or other residents upon the reservation to assist with community labor.

(i) To create and maintain a tribal council fund by accepting grants or donations from any person, State, or the United States, or by levying assessments of not less than ten cents, and not to exceed one dollar (\$1.00) per year, per capita on the qualified voters of the Cheyenne River Sioux Tribe, and to require the performance of community labor in lieu thereof, provided the payment of such per capita levy shall be made before any person shall vote in any election held more than six months after the date of said levy; and to levy taxes and license fees subject to review by the Secretary of the Interior, upon non-members doing business with the reservation. Any money so collected shall be disposed of as provided for in article IV, section 1 (g) of this constitution.

(j) To provide by ordinance, subject to review by the Secretary of the Interior, for removal or exclusion from the territory of the

Cheyenne River Sioux Tribe of any non-members whose presence may be injurious to the members of the tribe morally or criminally.

(k) To promulgate ordinances for the purpose of the safe-guarding the peace and safety of residence of the Cheyenne River Reservation, and to establish courts for the adjudication of claims or disputes arising among the members of the tribe and for the trial and punishment of members of the tribe charged with the commission of offenses set forth in such ordinances.

(l) To purchase under condemnation proceedings, land or other property needed for public purposes, subject to the approval of the Secretary of the Interior.

(m) To protect the public health and morals and to promote the public welfare by regulating the use and disposition of property of members of the tribe.

(n) To regular the inheritance of property, real and personal, other than allotted lands, within the territory of the Cheyenne River Sioux Reservation, subject to review by the Secretary of the Interior.

(o) To provide by ordinance for the appointment of guardians for minors and mental incompetents, subject to the approval of the Secretary of the Interior.

(p) To adopt resolutions regulating the procedure of the council itself and of other tribal agencies and tribal officials of the reservation.

Sec. 2. Manner of review--Any resolution or ordinance which, by the terms of this constitution, is subject to review by the Secretary of the Interior, shall be presented to the superintendent of the reservation, who shall, within ten (10) days thereafter, approve or disapprove the same. If the superintendent shall approve any ordinance or

resolution, it shall thereupon become effective, but the superintendent shall transmit a copy of the same, bearing his endorsement, to the Secretary of the Interior, who may within ninety (90) days from the date of enactment, rescind the said ordinance or resolution for any cause, by notifying the tribal council of such rescission.

If the superintendent shall refuse or approve any resolution or ordinance submitted to him, within ten days after its enactment, he shall advise the tribal council insufficient it may, by the majority popular vote, refer the ordinance or resolution to the Secretary of the Interior, who may, within ninety (90) days from the date of its enactment, approve the same in writing, whereupon the said ordinance or resolution shall become effective.

Sec. 3. Future powers.--The council shall have the power to act on such other necessary

or emergency cases as may be delegated to the tribe by the Secretary of the Interior, or by any other official or agency of the Government.

Sec. 4. Reserved powers.--The foregoing enumeration of powers shall not be construed to limit the powers of the tribal council, but all powers of local government not expressly entrusted to the council by this constitution and by-laws shall be reserved to the legal voters of the Cheyenne River Tribe. Such powers may be exercised through appropriate by-laws and constitutional amendments.

. . .

ARTICLE V--TRIBAL COURT (Judicial Code)

Section 1. (a) It shall be the duty of the council to provide, through the necessary by-laws or ordinances, for the establishment of a tribal court upon the reservation.

(b) This court shall have jurisdiction over all such petty offenses not falling

within the exclusive jurisdiction of Federal or State courts, as may be provided in the ordinances of the tribe.

(c) This court shall have jurisdiction over all Indians upon the reservation and over such disputes or lawsuits as shall occur between Indians on the reservation or between Indians and non-Indians where such cases are brought before it by stipulation of both parties provided that jurisdiction over Indian employees of the Indian Service shall be subject to rules and regulations prescribed by the Secretary of the Interior.

(d) The duties and jurisdiction of this court shall be more fully prescribed by appropriate by-laws or ordinances.

Sec. 2. It shall be the duty of the council to establish by ordinance a tribal police force which shall have full jurisdiction upon the reservation, the authority and duties of this police force

under which it will function may be outlined by the council, such police to be employees of the council and shall be an agency of the tribal court.

ARTICLE VII--LAW OF PROPERTY

Section 1. It shall be the duty of the council to pass rules and regulations to prevent unauthorized prospecting or mining of any kind upon the reservation and to see that such rules and regulations are properly enforced.

Sec. 2. The council shall pass ordinances for the control of hunting and fishing upon the reservation, not conflicting with any of the Federal or State game laws. The council shall enforce such ordinances and cooperate with Federal and State authorities for protection of game on the reservation. Further, the council may issue licenses for hunting and fishing and shall establish and act for same.

[Page 1]

Tribal
License Sales

These licenses are valid only on tribal land. The appropriate state license is required on all other land within the reservation boundaries. That applies to everyone including tribal members.

Be careful to select the right license and/or license book. They are not clearly marked.

Non-members are required to follow all state, federal and tribal regulations.

Big Game:

- (1) Nonmembers wishing to hunt deer and antelope are required to purchase both licenses.
- (2) Nonmember deer licenses should specify "Any Whitetail Only".

- (3) Members are entitled to one deer and one antelope tag for the \$12 fee.
- (4) Along with the license be sure to include tag and Hunter Information Card.

United States Army Corps of Engineers,
Omaha District, Lake Oahe,
Oahe Dam Boating and Recreation Manual

March 1984
Sheet 1 of 30, ¶ 10.

10. Hunting and fishing is allowed on Lake Oahe and project land, unless posted otherwise, in accordance with the rules and regulations established by the North Dakota Game and Fish Department, South Dakota Game Fish and Parks Department and the U.S. Fish and Wildlife Service. These regulations may change annually, so hunters and fishermen are advised to review current regulations before engaging in these forms of recreation.

JURISDICTION MEETING

1:05 p.m.

01-22-85

PRESENT: Ronald W. Lee, Natural Resources
Dept. Director
Brenda Dupris, Tribal Court
Administrator
Jim Fougere, Game Fish & Parks
Wildlife Biologist
Byron In The Woods, Pesticide
Enforcement Officer
LeNeta R. Miner, Tribal Land
Director

The meeting was not officially called to order as all who were asked to be present were not in attendance but, the following was discussed and decided on.

Ron informed Brenda that they will meet with the Land and Natural Resources Committee on Friday, January 25, 1985 at 9:00 a.m., to go over the Hunting and Fishing code.

Discussion was held concerning Tribal jurisdiction over hunting and fishing within the exterior boundaries of the Cheyenne River Indian Reservation. Everyone hunting within

the reservation is required to buy a tribal license. Jim stated he talked with Game, Fish & Parks personnel in Mobridge regarding the state issuing licenses to hunt, etc. on the reservation. Discussion was then held on the fact that the Cheyenne River Sioux Tribe does not have to become involved with the state, as we plan to go for total jurisdiction as far as hunting, fishing, etc., due to the Solem vs Bartlett case, and other Supreme Court Rulings. Following discussion it was decided to go with plan A, which would be total jurisdiction; plan B, would be to make agreements with the state; and plan C, would be to leave as is.

It was also brought up that there are still gray areas in the Supreme Court Ruling, but these would come to light when violators are caught and prosecuted in court.

The matter of the Game Wardens receiving training was brought up. Although it was felt

that they should have more training for their jobs, funds are needed to train them. Budgets have been cut and at present they are unable to patrol as they are financially unable to purchase gasoline. Can purchase only on a limited basis.

/s/

L. Miner

PTA LL

September 15, 1986, letter from Corps of Engineers to Jeff Stingley, Secretary, Game, Fish and Parks Department

Page 1

¶ 4

The position of the Omaha District, as well as the State of South Dakota, has always been that regulation of hunting and fishing on Corps project lands in South Dakota is a matter of state law. This was clearly the intent of Section 4 of the 1944 Flood Control Act, 16 U.S.C. §460d. As you know, the Corps has only proprietorial jurisdiction over its project lands along the mainstem of the Missouri River in South Dakota. Such lands remain subject to state, civil and criminal jurisdiction.

Exhibit 8

Revision 1987

TITLE XIII

CHEYENNE RIVER SIOUX TRIBE

HUNTING, FISHING AND OUTDOOR

RECREATION CODE

. . .

Section 13-1-12 ENFORCEMENT

- (1) It shall be the duty of every Tribal Conservation Officer and Tribal Law Enforcement Officer to enforce the rules, regulations and ordinances promulgated hereunder relating to hunting, fishing and trapping. Such officers may issue citations and/or make arrests and bring before the proper court any persons violating any rules, regulations or ordinances adopted and pertaining to the policy, intent and purposes of this Code.

Section 13-1-13 AUTHORITY TO ENTER PRIVATE
LAND

- (1) Any officer in the course of his duties, may enter upon private land within the boundaries of the reservation and remain thereon while performing such duties hereunder, and such actions by the officer shall not constitute trespass [sic].

Section 13-1-14 SEARCH

- (1) Any officer may search without warrant any conveyance, or any receptacle for game animals, birds, fish or any package, box or hunting camp or similiar [sic] place which he has reason to believe contains evidence of violation of this Code, regulations, ordinances or rules adopted hereunder pertaining to hunting, fishing or trapping.

Section 13-1-15 ARREST WITHOUT WARRANT

- (1) Any officer may, upon probable cause, seize without warrant, all birds,

animals, or parts thereof taken, killed, transported or possessed, contrary to the provisions of this Code or any regulation, rule or ordinance pertaining to hunting, fishing or trapping, and may seize without warrant bows, guns, traps, nets, seines, decoys, boats, lights, fishing tackle or other device unlawfully used for hunting, fishing or trapping. Such officer shall issue a receipt to the person in possession of the items seized stating time, place, date, items seized, where such items will be held and the name of the officer seizing said items.

Section 13-1-16 SCHEDULE OF FINES

- (1) The Committee may adopt a schedule of fines to be imposed for violations of this Code, by the Tribal Court.

Section 13-1-17 PENALTIES FOR VIOLATION OF THE CODE: PROCEDURES

- (1) Violation of any provision of this Code or any regulation or proclamation issued thereunder by the Tribal Council shall, unless otherwise designated, be a civil offense and may, in addition be punishable by revocation of fishing and hunting or other licenses, confiscation and forfeiture of equipment, and expulsion of nonresident nonmembers from the Reservation, and such other authorized action as the Tribal Council may deem appropriate.
- (2) At the time the field detention is made and/or citation is issued for violation of this Code, the officer may confiscate any fishing equipment, rifles, guns or other fishing or hunting equipment or paraphernalia as reasonably appears to have been involved in the commission of the violation for which the citation has been made and shall give the person from

- whom such things were taken an itemized receipt for all such confiscated items. The Court, when hearing the case concerning the alleged violation, may in addition to any other liability imposed upon a finding of a civil violation, offer the forfeiture to the Department of all or part of the confiscated items, only upon a finding that the facts constituting the alleged violation merit such further penalty.
- (3) Not less than once each year, the Director or his designated representative shall conduct a public sale of all confiscated items not appropriated for the official use of the Department. Such sale shall be by auction, held after not less than one week's notice to the general public, and the proceeds therefrom will go into the Game Fish & Parks Enterprise Account.

. . . .

- (5) In cases of violations of this Code or any regulation or proclamation issued hereunder in which the person alleged to have committed the violation resides within the territorial jurisdiction of the Tribe, the accused person shall not be taken into custody if he voluntarily signs a promise, printed on the citation issued for the violation, that he/she will appear before the Tribal Court within ten (10) days, and if, in the judgement of the officer involved, no arrest is necessary to protect the peace and safety of the reservation.
- (6) In cases of violations of this Code or any regulation or proclamation issued hereunder in which the person alleged to have committed the violation, does not reside within the territorial jurisdiction of the Tribe, the accused

person shall not be taken into custody if he/she a promise, printed on the citation issued for the violation, secured by a bond, that he/she will appear before the Tribal Court within ten (10) days and if, in the judgement of the officer involved, no arrest is necessary to protect the peace and safety of the reservation. Such bond shall be equal to 50% of the maximum fine leviable, or \$50.00 for each offense, whichever is greater.

PTA MM

Senate Hearing No. 100-500

FINAL REPORT OF THE GARRISON UNIT JOINT
TRIBAL ADVISORY COMMITTEE

November 19, 1987

(p. 12)

Senator Burdick. Mr. Chairman, you have covered the ground quite well, but I would like to ask one last question here.

The committee has been advised that the impact of non-Indian recreational use of the shoreline has resulted in numerous cases of trespass on Indian lands and the disregard of Indian property rights by non-Indians seeking access to shoreline areas. Is your agency vested with authority to address this problem?

Mr. Doyle. Sir, we have a responsibility to operate and maintain our projects in accordance with Congressionally authorized

directives. I am not certain to what extent we have enforcement authority over tribal lands. Perhaps I can ask Mr. Velehradsky to answer that, and if we need more, we will supplement our answer for the record.

Mr. Velehradsky. Senator, it is my understanding that, in this instance, we would rely on the State agencies for jurisdiction over the enforcement of laws on those areas. The United States or the Corps of Engineers has no jurisdiction in terms of enforcement within the project. We rely on the State agencies.

Senator Burdick. What do you mean no jurisdiction? They have the jurisdiction. They just assign some of it to somebody else to maintain. They have jurisdiction.

Mr. Velehradsky. We have jurisdiction over the land, but in terms of enforcing State game laws, we do not have any jurisdiction over State game laws.

Senator Burdick. What about trespass?

Mr. Velehradsky. Trespass we would have.

Mr. Doyle. But I think the legal question that we need to look into and amplify for the record is to what extent we have authority to go onto Indian lands to enforce that, and I will provide that for the record, sir. I don't have the answer at the top of my head.

Senator Burdick. This is an anomaly. There is trespass on Indian lands, but you can't go on Indian lands to stop the trespass.

Mr. Doyle. Well, maybe I can, but that is what I have to find out for you. I can't tell you right now, but I will get that for the record.

Senator Burdick. All right. Thank you.
[Material to be supplied follows:]

The Corps relies on local and state police assistance for law enforcement activities on Corps lands. In fact, the Corps

has been authorized by law to pay local and state police for expenses incurred when engaged in additional law enforcement activities on Corps lands. The Corps does not possess law enforcement authority on adjacent tribal reservation lands. The Federal Government, as trustee of Indian lands, has an interest and responsibility in protecting tribal lands against intrusion by trespassers. To my knowledge, this function would have to be undertaken by the U.S. Attorney or the U.S. Marshall. In some states, legislation has been passed whereby the state has taken on the responsibility to protect Indian lands from trespassers, and the U.S. Supreme Court has upheld the validity of these statutes. To my knowledge, the State of North Dakota has not enacted such legislation. Thus, the Tribes must rely on the assistance of the U.S. Attorney.

Letter to Donald McGhee, Chairman, Crow Creek Sioux Tribe from Steven G. West, Colonel, Corps of Engineers [p. 1, 2d ¶; p. 2, first full ¶; p. 3, first sentence of middle ¶.]

These project lands are not now Indian lands nor have they been Indian lands since the dates they were acquired by the United States as parts of general public projects. As of the dates these lands were acquired all Indian rights, titles and interests were extinguished except for minor residual interests such as permission to graze livestock above the ordinary highwater mark and the retention of oil, gas and other minerals which are subject to a permanent flowage easement that was taken by the United States. These minor residual interests in no way diminish the right, title and interest that was acquired by the United States in these lands for use as parts of general public

projects for the use and benefit of the general public.

. . . .

While I take no position as to whether the Tribe or the State ultimately should have jurisdiction in this matter, until the question is finally resolved I must be guided by the existing legal record and court decisions. These indicate to me that it was the intent of Congress that jurisdiction over these former Indian lands is in the State of South Dakota.

. . . .

This relatively recent assertion of jurisdiction by the Tribe without any apparent legal authority to support it can only result in conflict and confrontation which will deprive the general public of the right to peacefully enjoy the use of public recreation areas.

Exhibit 2

February 13, 1989

Ordinance No. 52

Cheyenne River Sioux Tribe of South Dakota

An Ordinance providing for civil forfeiture of property utilized in violation of Cheyenne River Sioux Tribal Law.

BE IT ORDAINED BY THE CHEYENNE RIVER SIOUX TRIBE OF SOUTH DAKOTA:

Section 1. Policy.

The policy of the Cheyenne River Sioux Tribe is that:

A. All property, articles, items and materials utilized in a manner contrary to any ordinance of the Cheyenne River Sioux Tribe shall be subject to forfeiture to the Cheyenne River Sioux Tribe pursuant to the procedures designated herein.

B. The forfeiture of property pursuant to this Ordinance shall be a civil proceeding, instituted as an action In Rem.

Section 2. Subject Property.

The following property shall be subject to forfeiture to the Cheyenne River Sioux Tribe and no property right shall exist in them:

A. All property used in violation of Ordinance No. 41a, the Cheyenne River Sioux Tribe Gaming Ordinance, as more specifically designated therein.

B. All alcoholic beverages located on the premises of a business establishment which is operating in violation of Ordinance No. 48, the Cheyenne River Sioux Tribe Liquor License Ordinance.

C. All property, of any description, which is used in a manner which violates any other ordinance duly enacted by the Cheyenne River Sioux Tribe.

D. All vehicles or conveyances which are used, or are intended for use, to transport or in any manner to facilitate the transporta-

tion, sale, receipt, possession or concealment of property described in paragraphs A, B or C, except that--

(1) no conveyance used by any person as a common carrier in the transaction of business as a common carrier shall be forfeited under the provisions of this section unless it shall appear that the owner or other person in charge of such conveyance was a consenting party or privy to a violation of any tribal ordinance; and

(2) no conveyance shall be forfeited under the provisions of this section by reason of any act or omission established by the owner thereof to have been committed or omitted by any person other than such owner while such conveyance was unlawfully in the possession of a person other than the owner in violation of federal, state or tribal criminal laws.

E. All books and records, including microfilm, tapes and data which are used, or intended for use, in violation of any tribal ordinance.

F. All moneys, negotiable instruments, securities or other things of value furnished or intended to be furnished by any person in exchange for any article or service in violation of any tribal ordinance, all proceeds traceable to such an exchange, and all moneys, negotiable instruments and securities used or intended to be used to facilitate any violation of any tribal ordinance, except that no property shall be forfeited under this paragraph, to the extent of the interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner.

Section 3. Procedures for seizure.

A. Any property subject to forfeiture to the Cheyenne River Sioux Tribe under this ordinance, with the exception of seizures made under the conditions listed in Section 3(B), may be seized by the Cheyenne River Sioux Tribal Police under process issued pursuant to the following procedures:

. . . .

(7) Remission or Mitigation of Forfeiture. The Tribal Court, if it determines that there has been no violation of Tribal law, or finds the existence of mitigating circumstances which justify remission or mitigation of the forfeited property, may remit or mitigate the forfeiture on such conditions as it deems reasonable and just.

B. Seizure without process, as designated in Section 3(A), may be made when:

(1) The property subject to seizure has been the subject of a prior judgment in

favor of the Cheyenne River Sioux Tribe in a civil injunction or forfeiture proceedings;

(2) The Cheyenne River Sioux Tribal Chairman has probable cause to believe that the property is directly or indirectly dangerous to health or safety; or

(3) The Cheyenne River Sioux Tribal Chairman has probable cause to believe that the property has been used or is intended to be used in violation of any tribal ordinance, and has charged the person in possession of the property with a violation of the applicable Tribal ordinance.

In the event of seizure pursuant to paragraph (2) or (3) of this subsection, proceedings under subsection A of this section shall be instituted promptly. All seizures pursuant to this subsection shall be conducted according to the provisions of subsection 3A(5).

. . . .

Section 6. Vesting of Title in Cheyenne River Sioux Tribe. All right, title and interesting property described in Section 1(a) shall vest in the Cheyenne River Sioux Tribe upon commission of the act giving rise to forfeiture under this ordinance unless the forfeiture is remitted or mitigated pursuant to Section 3A(7).

State of South Dakota v. Ducheneaux

November 1988 Preliminary Hearing and October 1989 Trial Transcripts.

McCrea Preliminary Hearing Transcript

[p. 112, ll. 6-21]

Q A major part of your duties is law enforcement, I assume; is that correct?

A Yes.

Q Have you made arrests in the time that you were conservation officer?

A Yes. In Ziebach County approximately 25.

Q Have you ever done law enforcement on Corps of Engineers land?

A Yes, a number of times.

Q Do you have any idea how many?

A I'm going to estimate at least several dozen times.

Q Has the Tribe ever attempted to interfere with your law enforcement activities on non-Indians Corps land?

A No. They've been good.

Q Has the United States ever tried to interfere?

A No.

Mickelson Preliminary Hearing Transcript
[p. 127, ll. 3-25; p. 128, ll. 1-16]

Q Have you ever engaged in law enforcement activities on Corps of Engineers land?

A Yes, sir.

Q Do you have any idea how many--well, let me ask you what kinds of activities you performed on the Corps of Engineers land?

A I would check fishing licenses and some hunting licenses in the area of Rousseau Creek and in the area on the Moreau River south of Jim Ducheneaux.

Q Did you check for gill netting?

A Yes, sir.

Q Check for violation of limits?

A Mainly the main limit checking was done out of the State patrol boat, safety patrol boat and that would be done along the, of course from the water and checking boats, fishing on the Moreau and up in the confines and bays of different areas in Dewey county.

Q Did you ever make any arrests on Corps of Engineers land?

A Yes, sir.

Q Do you know about how many?

A Two that I can remember.

Q Did you ever have any law enforcement contacts, other law enforcement contacts on Corps of Engineers land. Can you qualify those?

A Other law enforcement contacts. I don't know where you're headed.

Q Where you checked somebody's license, the kinds of things you were talking about before.

A We would check smelters in Rousseau Creek in the spring when the smelt would go on their runs. We'd be down there checking licenses making sure they were complying with the daily limit.

Q Was that an ordinary kind of thing for you to be doing in the ordinary course of business?

A I felt like it was my responsible [sic] to check all non-Indians in all locations in Dewey County.

Q Including the Corps lands?

A Including the Corps lands.

Crouch Preliminary Hearing Transcript
[p. 138, ll. 11-25; p. 139, ll. 1-14]

Q Have you ever personally engaged in law enforcement activities on Corps of Engineers lands this past year?

A Yes I did.

Q What did you do?

A Checked the shore fishermen during the opening of the grouse season. I also checked hunters hunting along the Corps areas.

Q Hunting grouse?

A Grouse.

Q Do you know about how many hunting checks you made on the Corps lands this year?

A Fifteen-twenty people.

Q Have you been engaged in law enforcement activities on Corps lands through the past years?

A Yes, since I started as a conservation officer in Timber Lake in 1976.

Q So since 1976 you have been doing law enforcement on Corps land?

A Yes. Most of the year up there it's shore fishermen and then some grouse hunters and a few late season predator hunters.

Q Has the Corps ever told you you can't do that?

A No.

Q Has any person, any Indian person ever made an allegation to you that their cattle were harmed because of hunting activities on the Corps land?

A Not on the Corps land.

Lebeau Preliminary Hearing Transcript
[p. 179, ll. 5-25; pp. 180-181; p. 182, ll. 1-8]

Q In carrying out your duties as buffalo manager have you experienced any difficulties with non-Indian hunters?

A Yes, sir. Repeatedly, yes.

Q Can you describe those difficulties?

A Well, what season do you want me to start at, deer season, bird season?

Q Deer season if you want to.

A Bird season is first. I'll start with that. Prior to around two-three weeks ago our fences, or excuse me, our gates into the unit, buffalo reserve, into the reserve ground did not have padlocks on them. We just latched them shut. On weekends we'd get a large amount of non-Indian bird hunters coming across the bridge and they would drive down into the breaks and they would come into the unit and start walking up and down the creeks shooting birds.

As far as high powered rifles, that I don't know about. Basically it was the bird hunters.

Q What's the impact of bird hunters when they hunt there?

A It disturbs our herd. There's also, in my opinion, there's a grave danger of one of the hunters possibly getting attacked by one of our herd bulls because it's a wild animal.

Q Your gates are now padlocked. Why did you put the padlocks on?

A To try and keep the hunters out.

Q Did you have problems with the gates being opened?

A Yes. Gates were left opened. I had fences cut. that type of thing.

Q How do you know that it's the non-Indian hunters that are causing the problems?

A Because I've talked to and had several confrontations in person with non-Indians who are hunting there. I caught them redhanded.

Q When you say caught them--

A I actually witnessed them driving in, getting out, loading shotguns and walking down the creeks at which time I would drive over there and get out of my vehicle and tell them they had to leave.

Q Were they on trust land?

A Yes, sir, they were all on trust land.

Q Have you encountered problems with people hunting on the taking area?

A Yes, sir. I have had those problems, too.

Q What are those problems?

A Mainly it's with the boaters, the individuals that come across the river on the boats. What they do is they pull up to the shoreline, get out of the boat then walk up and down the creeks that lead into the river.

Q Is it the same problem leaving gates open?

A On the boats, no.

Q Shooting among the herd?

A Yes, sir. There have been instances where I've witnessed boat hunters shooting at birds flying in front of where the herd was standing.

Q Is there ever any trapping that goes on in this area?

A In the reserve itself, no. Where I live, yes.

Q Who traps down there?

A I don't know the individuals. I had a confrontation with one non-member and that took place in '82, '83 sometime in there.

Q Can you describe that situation?

A My wife and I were out cutitng [sic] firewood, driftwood along the shoreline and we went down to the shore and we found a dog that we recognized as being from the Swift Bird Community caught in a trap. I happened to have my pistol with me and I shot the dog because it was, it's left front leg had been

all mangled and it was all swollen up. I took the trap off the dog and just, I was angry and I threw the trap into the water.

It was I would guess maybe an hour or so later we had moved further down along the point to another stash of wood and this individual came across on a boat. The first place he went to was where we had found the trap. He didn't get out of the boat. He turned around and he came back to where my wife and I were at. He again did not get off his boat and I had a brief verbal exchange with him at that time.

Q Do you know, was the trap on Corps land?

A Yes, Sir, it was.

J. Lebeau Preliminary Hearing Transcript
[p. 186, ll. 2-25; pp. 187-189; p. 190, ll. 1-21]

Q Do you have a range unit from the Tribe?

A Yes I do.

Q How do you get a range unit from the Tribe?

A Well, if you own cattle you can apply for a range unit allocation. I have cattle.

Q About how big is your range unit?

A About 1,000 acres, I guess.

Q Does it include land that's held in trust?

A Yes it does.

Q Does it include Corps taking land?

A Yes it does.

Q Is it fenced?

A Yes, it is fenced.

Q Is the taking area fenced from the trust land?

A Do you mean is it separated?

Q Yes.

A No.

Q Do you reside on your range unit?

A Yes I do.

Q Have you encountered any problems with non-Indian hunters on your range unit?

A Yes I hae [sic].

Q Can you describe those problems?

A My problems with them is gates. Three of the gates that I have that access into my range unit are on Corps land. One of them I can observe from my kitchen window and I see some of them close them, some of them don't. I found it necessary to go down and wire the gate. that is, the one on the boat dock side. My range unit incidentally is split by Highway 212. Part of it's on one side and part of it's on the other.

When I did that then they go down to the water gap and they let the wires down and they go around that way.

Q What kind of problems does that cause?

A It causes serious problems because of the highway. I can have them killed out there.

Q Your livestock?

A My livestock, yes.

Q Do you have similar problems with Tribal members hunting on your land?

A Generally they ask and generally they are on foot.

Q Because they're on foot they don't have the same amount of difficulties with the gates?

A No. They crawl through the fence.

Q Have you ever encountered any problems with non-Indians driving up and down the road that divides your property?

A Yes. I'm an early riser, mostly just because I'm a rancher. Hunting season I can see them start coming off on the flat. They just come over car after car after car. Soon as they hit the west side they split up and they start shooting all the way up. They'll shoot from the highway. It makes me angry. It's dangerous.

Q Are they hunting on the right-of-way?

A Hunting on the right-of-way and those going down, branching off at the boat dock and on the park side, the Tribe also has a park

down there. They start branching off of there, especially when it's grouse or prairie chickens, whatever you call those birds; that's when it's most dangerous.

Q Are they shooting onto trust land?

A Sir, yes, except where it's further closer to the bridge then thta's [sic] Corps land on either side. But as you come up towards my place you get on Tribal land and they're shooting.

Sir, I have the breaks that run down all along there which is conducive to wildlife, birds, deer, fox, I have everything in my unit. But the birds, the grouse are the ones that they shoot from the highway.

Q Have you ever had an difficulties with people driving three-wheelers on your property?

A That is the most irritating, the three-wheelers.

Q Are those hunters?

A I assume they must be hunting. What else are they doing in there.

Q What kind of problems do they create?

A They too, in fact the man from the Corps that was there one day, I was showing him something else and there were the tracks of the three-wheelers. They just let my fence down and went right on through.

Q They were on the Corps land?

A They were on the Corps land but my fence runs down to the river and that's my fence to put, to keep my cattle in, my horses and whatever else. And anymore to keep them out.

Q Have you ever noticed State wardens policing these sorts of activities?

A That's what makes me angry about it. I never see them. By the time those hunters [sic], at 5:00 o'clock in the morning you can see them go and when I see the Corps, whatever they are, the game wardens or something, it's

the middle in the afternoon. Those guys have left already.

MR. McELROY: No further questions.

CROSS EXAMINATION

BY MR. GUHIN:

Q Mrs. Lebeau, can you tell me the last time you called a State conservation officer?

A I don't call those people, because my people are those people over there and they're the ones that have jurisdiction as far as I'm concerned. I call them and report it over there. Or I call land operations or I call the BIA when I have those problems because we have jurisdiction.

Q Apparently for the same reasons you wouldn't be interested in a civil remedy in State court?

A In what?

Q A civil remedy in State court being available to you?

A I don't know what that has to do with anything.

Q Has any of your cattle actually ever been hit by a car?

A No, but they have been chased around when they come running home, yes. They have been bothered and disturbed.

Q Do you know what a cattleguard is?

A Yes I know what a cattleguard is and I darn near had a horse killed because the Corps put a cattleguard down there.

Q You don't want cattleguards on your property?

A No I don't.

Q It would help the situation though, wouldn't it?

A I don't want a cattleguard because they are dangerous for livestock.

Fischer Preliminary Hearing Transcript
[p. 193, ll. 9-25; p. 194, ll. 1-13]

Q Have you encountered any difficulties with non-Indian hunters on your range unit?

A Yes.

Q Could you describe those problems for us?

A Well, in my opinion the majority of them come in there and hunt on the Corps land with the attitude that they don't need permission for anything. They just come in there and do as they please.

There is no distinct markings for a line from the Corps to the trust land. They shoot and drive across back and forth and, you know, usually they never know for sure which they're on unless they're right down next to the river.

Q Does that create any particular problems for you in grazing your livestock on your range unit?

A Yes. Sometimes like if they're down in the trees shooting the cattle are back out, you know, up next to the hills there. They

can shoot in the direction of the cattle and, you know, you would never know unless they actually hit one.

They have shot a goat that had been on our place for years.

Q How do you know that it was non-Indians that shot the goat?

A Because that particular fall, or I should say at least that particular week for sure there was no Indian members down in that area hunting at all.

Q Do you have any problems with gates and fences and those sorts of things?

A Occasionally.

Rousseau Preliminary Hearing Transcript
[p. 204, ll. 16-25; p. 205, ll. 1-16]

Q Have you encountered non-Indian hunters without a Tribal license on Corps land?

A One particular instance, yes.

Q Can you tell us briefly about that?

A Okay. This I believe was in '87. The Tribal Council went on record to shut down deer hunting season, both species. Therefore there was no deer season within the Tribal Reservation.

I encountered a Michael Keys on Corps taking area. So then I, prior to this I had radioed into the police department and an officer come down to assist me in the incident. I went down and confronted Mr. Keys about it and he said he didn't have to have a Triba [sic] license. I said within the Reservation boundaries there is no deer season. He said well, I'm aware of that and stated that he worked for the Corps of Engineers and that this was open to the public.

He advised me to call in the State game warden which I complied with his wishes. We call in Petri and John Kirk, I believe it was, Tom Petri and John Kirk.

So we held a small discussion there and was later advised to call in John Cooper. We got ahold of Mr. Cooper on the state radio and he advised us that at the present time the Tribe did not have jurisdiction on this piece of land. So then we considered Mr. Keys was perfectly within his rights and we let him go.

Hanten Trial Transcript

[p. 7, ll. 3-25; p. 8; p. 9, ll. 1-7]

Q How long have you worked with the Missouri River reservoirs?

A Since I moved to Pierre in 1965.

Q And you've worked with them as part of your position with Game, Fish and Parks, is that right?

A Correct.

Q What does South Dakota do and what has South Dakota done to manage the reservoirs?

A We've been involved in reservoirs since they were first created. We began work in monitoring the fish populations shortly after

the reservoirs were closed and we have also been involved in enhancement of the habitat and setting regulations and enforcing regulations.

Q Have you been involved in the regulatory effort on the reservoirs since the very first?

A We began our recommendations to the Corps of Engineers on various water levels as far as benefitting fish around 1952.

Q Speaking to the issue of law enforcement on the reservoirs; have we been consistently involved in that effort on the reservations?

A Yes we have. We have established fishing regulations for the State of South Dakota and the reservoirs since the reservoirs were closed and began to fill and our law enforcement people have enforced those regulations.

Q And by regulations do you mean limits for size of fish and number of fish and so on?

A That's correct.

Q How important is our ability to be able to do that as part of the management effort?

A We feel that is very important. If there were no regulations and there were no enforcement there would be uncontrolled exploitation of the fish population.

Q Mr. Hanten, I'd like to trace with you an outline of how the reservoirs have developed and South Dakota's involvement in that. When was the Oahe Reservoir closed?

A Oahe Reservoir was closed in 1958.

Q When did South Dakota's work on the reservoir begin?

A The work began, our first report on reservoir investigation and monitoring the fish population was in 1959.

Q Okay. Can you identify Exhibits 175 through 178 please? Can you tell me what those exhibits are, Mr. Hanten?

A These four reports are our first reports on Oahe Reservoir done by Ned Fogle in the years of 1959, '60, '61, '62. Or '62-63.

Q What do these reports show, Mr. Hanten?

A These particular reports refer to the development of the fishery on Lake Oahe. After the initial closing various species were in the river system and they began to reproduce and the population changed from a river to a reservoir type of habitat.

The reports documented changes and reproduction of the various fishes that occurred in their relative abundance.

[p. 52, ll. 2-10]

Q Where do you take those eggs from the river?

A We take them at our spawning station on Foster Bay on the Cheyenne River and on the Moreau River and on the Grand River.

Q So the eggs come from the areas on the reservation?

A I'm not prepared to answer that.

Q But they come from the Moreau River and they come from the Grand River?

A That is right.

[p. 65, ll. 17-25; p. 66, ll. 1-5]

Q You manage law enforcement. Why is law enforcement important?

A Law enforcement is important to make sure the regulations are enacted to protect the species from over exploitation. Those regulations are important.

Q What would occur without the law enforcement?

A Without the law enforcement there would probably be over exploitation and depletion of the population to the point where it may not be a viable fishery.

Q Was South Dakota involved in law enforcement of the guidelines in the '60s and '70s?

A Yes.

Q Repair this problem, is that right?

A Yes.

Dave Fielder Trial Transcript

[p. 84, ll. 13-25; p. 85, ll. 1-23]

Q Now, if I look at the top of page 5 I see that the harvest goal for lower Lake Oahe is 30,000 to 35,000 Walleye per year, is that correct? And when we say lower Lake Oahe, are we talking about the same areas that we identified in 173?

A No. In terms of this document I believe I divided the lake into just two halves, upper and lower. There's no middle. Again there is roughly geographic, I believe I make somewhere in here specific designations, but they're roughly geographic halves of the reservoir so that they reflect--middle Oahe then would be approximately equally divided between upper and lower.

Q So on page 3 of 172 is a map and you'd just draw it in the middle of the area, your

dividing line in the middle of the area, I take it?

A Yes, I think so.

Q Now if I go back again to page 5 I see thta [sic] the total harvest goal for upper Lake Oahe is 200,000 to 250,000 Walleye per year. That's under paragraph 3. Do you see that?

A Yes.

Q We're talking about number of Walleyes, not pounds?

A That's right.

Q Those Walleye come from natural recruitment, do they not?

A Primarily, yes.

Q And that natural recruitment takes place where?

A Well--

Q If you know.

A A lot of it takes place in the Grand-Moreau river arm portions of Lake Oahe but

there is spawning areas all along the shoreline where some recruitment can take place. It's difficult to say exactly where.

Q But the Grand and the Moreau contribute significantly to that, I take it?

A I think so.

Riis Trial Transcript
[p. 100, ll. 14-25; p. 101, l. 1]

Q From this document can you tell the Court what the Walleye harvest is on an annual basis?

A In '86 the Walleye harvest I believe was about a quarter of a million fish, 250,000. From my professional judgment and in talking to our people in for example conservation officers in Gettysburg and Mobridge, '87 and '88 have also been exceptional years.

In other words, what I'm saying is we have an excellent Walleye fishery in Lake Oahe. In 1986 my estimate for the entire lake was 256,737 and it has been increasing in

lower Oahe and the numbers are up in the upper areas and so are the pounds. We have one of the finest Walleye fisheries in the country in Lake Oahe.

[p. 102, ll. 14-23]

Q Could you identify this document, Mr. Riis?

A Yes.

Q What is that?

A This report includes some of the same type of information that the last one we discussed had. In addition to the harvest there's some Walleye movement information in here. In the early '80s I believe we tagged about 16,000 or 17,000 Walleyes to learn about angler exploitation or another word for that is harvest rate, and also to learn about their movement.

[p. 104, ll. 19-25; p. 105; p. 106, ll. 1-16]

Q Are you also involved in your duties with the department with any endangered or rare species of fish?

A Yes, I have a study on Pallid Sturgeon in Lake Sharpe at the present time.

Q If you would take a look at Exhibit 197, Mr. Riis, can you describe what this document is?

A This is a study outline of our Pallid Sturgeon project. It's entitled Investigation and Conservation of Pallid Sturgeon in South Dakota. The Pallid Sturgeon is a very rare species and we in South Dakota have documented 40 percent of the Pallids from their entire range this summer. Their entire range I believe includes over 3,000 miles. Just yesterday I was told of a Pallid Sturgeon in upper Oahe but we have not documented that yet.

Q When you say 40 percent of the Pallid Sturgeon, how many are we talking about?

A Four out of ten.

Q That's along the entire system, is that correct?

A Yes.

Q Why do you have a study like this, particularly here of the Pallid Sturgeon? What's the significance of a study like that?

A There is a lot of interest in the Pallid Sturgeon at the present time. This species is in the process of being listed, it's in the Washington D.C. process and I am also interested in the species just because of all the work I've done on the river and have seen so few. They're probably a species that have been around for 300 million years. We are cooperating with the Corps of Engineers, the U.S. Fish and Wildlife Service, North Dakota and Montana on this species.

Q What do you do as part of this study?

A This entailed a great deal of sampling to collect these sturgeon and we surgically

implanted these Pallids with a sonic transmitter after taking all their measurements and making sure it was a Pallid Sturgeon as opposed to a Shovel Nose Sturgeon. Our sonic tags last approximately two years and we also equipped the fish with a lifelong tag. Some of these fish get up to 50 to 60 pounds and they might be that old. But the lifelong tag is called a pit tag and that is a passive intensive transponder.

We also have an external tag that says that this is a rare species and please release it and there's a phone number on it. So basically we are tracking their movements, trying to identify their habitat and learn about the sturgeon's spawning. We're attempting to artificially propagate the Shovel Nose Sturgeon, a closely related species.

Talsma Trial Transcript

[p. 158, ll. 6-25; pp. 159-161; p. 162, ll. 1-2]

Q Mr. Talsma, I believe you talked about the economic significance of the fishery. In fact, we had an exhibit did we not, that was a study that you commissioned on the economic value of the fishery? The fishery is quite important economically to the State, is it not?

A Yes it is. The State was making an investment of about \$2 million in fisheries during the period 1982 through '85. We wanted to make sure that that investment was a good investment.

Q It averages about \$3 million a year more or less for the fisheries throughout [sic] the state, doesn't it?

A I don't understand the question.

Q Can you tell me what the annual fishery budget for the State has been?

A The annual fisheries budget in the wildlife division approximates about one quarter of the entire wildlife division

budget. The wildlife division budget is about \$11 million. So it would be about \$3 million.

Q And about \$500,000 of that is devoted to the Oahe fishery, is that true?

A That would probably be a pretty close estimate, yes.

Q And when we say \$500,000, some of that money is federal aid money, is it not?

A Yes it is.

Q About two-thirds?

A No. It would be somewhere between probably about 50 percent and two-thirds, but a little less I would guess than two-thirds.

Q The State has attempted to as gain the return that it gets from its fishery at Lake Oahe, hasn't it?

A Yes it has.

Q Is it more than 500,000?

A Yes it is.

Q So reallyly [sic] the return is greater than the investment, isn't it?

A From the perspective of just dollar flows through the economy of the State of South Dakota, yes.

Q Of course you've got to use those dollars back into the fisheries, don't you?

A Yes.

Q That's a requirement actually of Dingell-Johnson, isn't it?

A Yes. We reinvest both the income from the excise tax on fishing tackle and our fishing dollars coming from the fishermen back into the resource.

Q If your annual budget is \$500,000 and you get somewhere over 50 percent from the federal government of that, you get back more than 500,000. What do you do with the excess?

A I believe you're misinterpreting the data that I shared with you about the relative economic value. The value when I talk about investment of \$10 let's say return on the dollar, that has to do with the flow through

of all the money throughout the State of South Dakota.

The money in the Department of Game, Fish and Parks is strictly used entirely for the resource. So whatever we take in we spend back on the resource. We've never had any surplus. Usually were [sic] on the deficit side.

Q I understand you don't have surplus within the department. I understood your testimony to be that, and correct me if I'm wrong, I understood your testimony to be that in terms of licensing fees that the department would attribute to Lake Oahe, you would get back more than \$500,000?

A On the long term, yes. Our investment returns is probably more, you're talking about the sale of fishing licenses?

Q Yes.

A The sale of fishing licenses on the long haul have been then our short term investment

from the standpoint like what we invested that \$2 million.

Q And I understand that you have to use it for fishery resources. With that money you get back above and beyond the money that you took in from Oahe, do you use it in the rest of the state for fishery resources?

A Oh yes. The funding in Game, Fish and Parks goes into one general fund for fish and game, that \$11 million and we, through our commission, can use that on game activities, small game, endangered species, fish or whatever. The only requirement the of [sic] federal government that you're talking about is that when we do a federal study, if we make any income off that federal investment that income has to be reinvested or reimbursed back to the federal fund.

Q You do that?

A None on fisheries that I know of.

Q You do get more back from licensing on Lake Oahe then you invest in the short term. I believe that was your testimony?

A Yes.

Q So that you have dollars that come in from Lake Oahe, fishing licenses, that are not returned to investment in the fisheries program at Oahe?

A That may be true on a given year, yes.

Q It's used in other places in the state, is that correct?

A Correct, in the total program.

[p. 173, ll. 17-25; pp. 174; p. 175, ll. 1-17]

Q Does the State have land that is leased out for agriculture purposes?

A Not directly. The State has land that it cost shares through a lease program with farmers or ranchers and then the crop is a share crop.

Q So the farmers get to use the land for agriculture purposes. Does the State retain any rights in those lands?

A Yes.

Q Do you keep control over the hunting and fishing that takes place on your own land?

A Yeah, on our own land.

Q On private land people can hunt or fish on private land, can't they?

A Yes.

Q Is there a problem with access to private land for hunting and fishing purposes?

A Yes, there can be.

Q Isn't that the reason that you are concerned about the public land?

A No, not entirely.

Q There are landowners who don't allow people to hunt and fish on their land, is that not correct?

A That is correct.

Q Why do they do that?

A For various reasons. Some say that they, you know, either are saving it for their own family. Some just don't want to have hunting or fishing. Some worry about safety. Some feel that the population can't stand the hunting or whatever it is. Whatever their opinion is.

Q Have problems with hunters sometimes harassing their livestock?

A Probably, yeah.

Q Those are all valid reasons, aren't they?

A From a landowners [sic] standpoint, sure.

Q Normally a landowner has that kind of control over his property, doesn't he?

A Yes.

Q I know that in Colorado they have a program that is known as "Ask First Program" which encourages hunters to ask landowners for permission prior to entering their land. Do you have a similar sort of program or policy

to encourage hunters to ask permission before they go on private land?

A Yes we do.

Q It's part of your regulations, isn't it?

A Pardon?

Q It's part of your regulations that the State puts out?

A That is correct. But, it's a public relation program too. We have in fact the same kind of bumper stickers and the same kind of things they have entitled "Ask First." We have additional programs too.

[p. 178, ll. 3-25; pp. 179-180; p. 181, ll. 1-19]

A Oh yeah. I spoke to that before and that was concerning such as wanting to have it for their own family or wanting to control the access or wanting to just have no hunting at all. Those types of concerns. In regard to the Corps of Engineers land though and that was what I was commenting on we manage from a

multiple use standpoint. That's our mandate from the Corps. Different from the Forest Service land which is permitting grazing all over and there's no conflict that I know of.

Q You're telling me for the Corps land that were acquired in connection with the construction of the Oahe from the Tribe or from Tribal members what we have been calling the taking area?

A Yes.

Q You know those lands, are you telling me you manage those the same as you manage on the public land within the state?

A We would treat them the same from, especially a joint management thing, the same we would other federal land that is under a similar grazing permit basis similar to the National Forest Service land which include grasslands, the forest land in the Black Hills of course is very protected. So in other words, people can go and hunt those sites.

There is multiple use, both grazing use and hunting use; both grazing use and fishing use or hiking or whatever purpose they would want.

Q Do you draw any distinction between the grazing interest held on the Corps land by the Cheyenne River Sioux Tribe and those grazing interests which may exist on other public lands?

MR. GUHIN: Your Honor, this again is a question of law.

MR. McELROY: I specifically asked the question as to interests, not as to rights.

THE COURT: Overruled.

A I would treat that interest the same as far as both federal agencies and they both have other uses, grazing use is taking place on those lands along with multiple uses. Public lands.

Q In your management policy of the State on those corps [sic] of Engineers land, taking areas that we have been talking about, is

there anything in the State policy that takes account of the Tribal hunting and fishing rights on those lands?

A I would believe so, yes. There is some of that. I'm not understanding the question I think entirely. But, in our dealing with the public we treat the public all the same. So there is no distinction between non-Indian or Indian. They have the same equal right to hunt those lands or fish them as what a non-Indian would have so there is not anything from that standpoint.

Q Excuse me. You treat the Tribal members the same as you treat [sic] non-Tribal members on the lands, is that what you are telling me? I'm confused.

A From dealing with recreating that is taking place on the tape line, either party can recreate on that land. But, there have been to my knowledge cases that allow the Tribe people to hunt those lands with the

Tribal license and so that is why I answered the first part of your question as, yes, that there are some differences.

In other words, the Tribal people on some Corps land do not need a license to fish or hunt.

Q But, it's your testimony that the State has been regulating the activities of non-members on the taking land, is that correct?

A Correct.

Q And your management of those non-members, do you do anything different with regards to the taking land on or adjacent to the Cheyenne River Sioux Reservation then you do on the remainder of the Corps taking lands on the Oahe Reservoir with regards to non-Indians?

A Nothing specific on those lands itself. We would, for example, advise someone if they had to access across Indian land to ask permission if they come in there by boat. It would be the same as hunting, any other way.

Q So is it fair to say in your management policies for those lands as to non-Indians you do not consider the hunting and fishing rights held by the Tribe, the Tribal members?

A I don't understand the question. I don't consider just to the rights to the Tribal members --

Q I want to make sure that we are clear at this stage.

A Okay.

Q As I understand your prior testimony in terms of the State's management policies of non-Indians on the Corps taking lands on or adjacent to the Cheyenne River Sioux Reservation --

A Correct.

Q -- State's policy as to non-Indians are no different then the State's policies say on the east side of the Oahe Reservoir across from the Reservation?

A That is correct.

Unkenholz Trial Transcript
[p. 239, ll. 6-18]

Q Why is it necessary to make these recommendations?

A Well, the Corps of Engineers as the managing agency of the water in the Missouri River Basin has responsibility to meet the needs of a whole host of users, and the fisheries' interests just being one of those. Our interest in this is to provide the Corps with the best objective information that we can in terms of how water levels impact fisheries, how certain water levels could actually enhance fisheries and if certain water levels actually be detrimental to fisheries. So we feel it is our responsibility as research planners to provide this information to the Corps of Engineers so they are able to use it in their decision making process.

Clown Trial Transcript

[p. 503, ll. 6-25; pp. 504-506; p. 507, ll. 1-8]

Q Is the closest you've ever seen deer and cattle together 150 yards?

A About like that.

Q Is your answer yes?

A Yes.

Q Mr. Clown, have you ever appeared in Tribal Court on a hunting and fishing violation in your six years?

A No, sir.

Q Have you ever been involved in any prosecutions of any Indian people for hunting or fishing on a violation -- excuse me -- have you ever been involved in any prosecutions of Indians for hunting and fishing on the reservation?

A I cited some in but I didn't go to court.

Q What was that case thta [sic] you cited somebody in?

A A fish, well, a hunting violation.

Q Do you remember what the name of that person was?

A Austin Rave.

Q Do you know what happened to him?

A I think he plead guilty so I didn't have to go to court at the arraignment.

Q Any other violations?

A Ray Briggs.

Q What happened to Mr. Briggs?

A His was dismissed.

Q Why was that?

A No evidence.

Q Any other violations?

A Ray Dupris.

Q What happened to him?

A Same. He was dismissed.

Q Did you have any further violations?

A Levi Miner.

Q Excuse me?

A Levi Miner.

Q What happened to Levi Miner?

A His was dismissed too.

Q Are there any other violations?

A I had two others, obstruction of governmental functions. But that wasn't a hunting violation.

Q It was not a hunting violation. Mr. Clown, have you ever done any work with depredation complaints?

A No, sir.

Q Have you ever done any work in depredation control like building fences and that kind of thing?

A No, sir.

Q Have you ever worked on animal damage for predator control like skunks or fox or something like that?

A No, sir.

Q Have you ever done any work with abnormal wildlife loss?

A No, sir.

Q Have you ever done any work with endangered species?

A No, sir.

Q Have you ever done any work with habitat development on Tribal land?

A No, sir.

Q Have you ever done any work on habitat development on deeded lands or non-Indian owned land?

A No, sir.

Q Done any habitat development on Corps of Engineers land?

A No, sir.

Q Have you ever done any work with cover plots or wetland restoration?

A No, sir.

Q Do you know whether the Tribe is a landowner on the reservation itself?

A Could you --

Q Is the Tribe a landowner on the reservation?

A Does the Tribe own Tribal land?

Q Yes?

A Is that how you mean it?

Q Yes?

A Yes.

Q Is it a substantial amount of land?

A What do you mean?

Q Well, let me ask this question instead. Do you know of any particular management practices on Tribal land to enhance wildlife?

A I don't know, sir.

Q In the past six years since you've been a game warden has there been any wildlife stocking done by the Tribe?

A You mean big game?

Q Any kind?

A No, sir.

Q Have you ever been involved in any stocking of fish on the Missouri River?

A No, sir.

Q Does the Tribe conduct any fish surveys on the Missouri River?

A No, sir.

Q Does the department own a boat for taking on the Missouri River?

A Yes. It's got a boat.

Q It does have a boat. Has the boat ever been on the Missouri River?

A Just on a demonstration.

Q How many times on demonstrations?

A Once.

Q Once. Does the Tribe maintain any docks or ramps with access to the Missouri River?

A No, sir.

Miner Trial Transcript

[p. 509, ll. 15-25; pp. 510-520; p. 521, ll. 1-14]

Q Would you state your name, please?

A Lenita Miner.

Q Could you tell me your present position with the Tribe?

A Game, Fish and Parks director and Tribal land officer.

Q You hold both positions?

A Yes I do.

Q When did you assume the position of land director?

A 1981.

Q When did you assume the position of Game, Fish and Parks director?

A October of '87.

Q What part of your time is spent as Game, Fish and Parks director?

A Quite a bit of my time. I'm soupposed [sic] to be a fourth time director. However, I spend a lot more time than that with the Game, Fish and Parks.

Q So it's officially a quarter but you spend more time, is that right?

A That's correct.

Q As part of this litigation you furnished records from Game, Fish and Parks to your

attorney who furnished them to us, is that right?

A Yes.

Q Are you familiar with those records?

A I believe so.

Q How far do these records go back?

A I believe maybe '83.

Q Are there any records older than '83 in there?

A Oh, yes. Not complete records though.

Q There are records that go back ten, twenty years, I mean beyond the '50s and '60s?

A Yes there are some in there.

Q But are there records that go back to the '50s and '60s?

A Yes there are records I think that go back that far.

Q And are records like weekly reports and daily reports included in those materials?

A I don't think that the weekly reports in there go back to the '50s.

Q Are the weekly reports that were done in the last decade, are they included; in the last ten years are they included in the records you gave us?

A Yes, I believe so.

Q Ms. Miner, since you've assumed the position of Game, Fish and Parks director, has the department done any reproduction studies on deer or antelope? By that I mean for example, have they done any studies of road kill and fetuses from the road kill for deer or antelope?

A I know what you mean. No, I don't believe that we've had the funding for those types of studies and we've not had a biologist on staff to conduct those types of studies.

Q Since you took over as Game, Fish and Parks director and before this litigation commenced, have you done any surveys on grouse or dove, partridge, any game?

A Yes. Surveys have been conducted.

Q What survey are you talking about?

A The wardens and the biologists have conducted both aerial surveys for deer and antelope.

Q When was the aerial survey for deer done?

A It was the beginning of this year.

Q Beginning of this year?

A Yes.

Q That's after this litigation was commenced, wasn't it?

A That's correct.

Q And the antelope survey, that was done after this litigation commenced, isn't that right?

A That's correct.

MR. GUHIN: If the witness could be handed Exhibit 272, please.

Q Do you recognize this exhibit?

A No I do not.

Q Can you read the title of it for us?

A Wildlife Survey Manual, 1988 through 1993.

Q That's a publication of the State of South Dakota, isn't it?

A Yes it is.

Q Before this litigation commenced the Tribe didn't have any similar manual, did it?

A Not to my knowledge.

Q Has the Tribe done any deer teeth studies like Mr. Rice described in your tenure as Game, Fish and Parks director?

A Excuse me, any what?

Q Deer teeth studies where the deer teeth are cut apart and analyzed for age?

A No we have not.

Q In your tenure as Game, Fish and Parks director has the Tribe done any harvest studies to determine the type of deer taken, the age of deer, sex of deer and so on?

A We began that last year for '88.

Q You began it in 1988 or 1989?

A 1988. However, we did not issue cards or forms at the time the licenses were issued. The wardens attempted to contact the individuals who had purchased licenses by phone. However, the forms that they were using to record the information have been misplaced.

Q That calling was done this spring, wasn't it?

A I don't recall the exact dates that they worked on that.

Q Was it done in 1989?

A Yes it was.

Q You don't have harvest information on deer, age, sex, type, so on for at least the last ten years, do you?

A I don't know about the time prior to when the department was placed under my charge.

Q Well, you're familiar with the records of your department, aren't you?

A I don't know each of the records by heart.

Q Does the department have an endangered species program?

A No we do not.

Q Does the department do any work in abnormal wildlife loss, say when you find five or ten dead out in the field. Does the department do any special studies after that occurs?

A No. We've never encountered any such problems.

Q As of April '88 were you going to recommend a deer season for the reservation?

A After April?

Q In April of '88. Do you recall whether at that time you were going to recommend a deer season for the reservation?

A I believe at that time we were thinking of keeping the big game seasons closed.

MR. GUHIN: I'd like the witness to be referred to her deposition, on page 42, Lenita Miner's deposition on page 42.

THE WITNESS: Okay. I've got it.

Q This is April of 1989. Maybe you won't need the deposition for this. As of April '89 were you going to recommend a deer season?

A Yes.

Q How many deer were you going to recommend?

A We were going to recommend that the licenses be limited to 200 to the general public.

Q And that license would be good on trust lands only, is that right?

A Yes.

Q Ms. Miner, does your department do any work in setting up food plots for wildlife?

A No, sir. We do not have the funding to do so.

Q Does your department do any work in wetland restoration?

A Again, we have not had the funding to carry those things out.

Q Does the department do any work in waterfowl nesting cover?

A No.

Q Ms. Miner, the Tribe is a major landowner on the reservation, isn't that right?

A That's correct.

Q Do you know about how much land the Tribe owns?

A The Tribe owns well over 900,000 acres.

Q Does the Tribe do any special management practices for wildlife enhancement on those lands?

A I don't believe so.

Q Ms. Miner, did you hear the testimony of Mr. Don McCrea as to the condition of the Tribal parks in April of '89?

A I sure did.

Q Do you agree with that testimony?

A I did not go out and personally see the parks so I did not know exactly what condition they were in. We were aware that they were in a rundown condition. But we have --

Q The question is do you agree in April of 1989 that was the condition of the --

A No I cannot agree to that. I didn't see the parks.

Q Do you have any knowledge that indicates that the condition was other than what Mr. McCrea described?

A The wardens explained to me that the parks were in need of repair. They did not inform me that they were in that bad of shape.

Q They described them as rundown, though?

A Yes they did.

Q Does the Conservation Reserve Program have anything to do with the wildlife planning? Let me ask this first. Do you know what the Conservation Reserve Program is?

A Yes I do.

Q Does the existence of that program have any connection with your wildlife planning?

A No it does not.

Q Does your department do any depredation work, for example, putting fences around stacks of feed?

A No. We've never received any calls to my knowledge. I never received any calls.

Q That would be true of depredation both on fee lands and Tribal lands?

A Correct.

Q You don't have any program to pay people for depredation done to their property then?

A No we don't.

Q Ms. Miner, do you recall any prosecution of an Indian person for hunting and fishing violations since 1981 when you were land director?

A For hunting and fishing violations?

Q Yes?

A The ones mentioned by the two wardens who testified earlier.

Q Any other incidents?

A No, I don't believe so.

Q Ms. Miner, are you aware of any criminal or civil action in Tribal Court against a non-Indian for hunting and fishing violations since 1981 when you were land director?

MR. McELROY: Object to the question. There's no foundation to ask her for what happened since 1981. She's only been in charge of the department since 1987.

THE COURT: Sustained.

Q Since 1987 do you recall any civil or criminal action against a non-Indian in Tribal Court for a hunting or fishing violation?

A Again, civil action, regarding those incidents which the two game wardens testified about.

Q Were any of those actions -- so the only incidents you know about were the ones that

the two game wardens just testified about, is that right?

A That's correct.

Q Were any of those actions against non-Indians?

A No they were not.

Q Does your department have any agreements with the Corps of Engineers to enhance fish and wildlife conditions on the Corps of Engineers lands adjacent to the reservation adjoining the Missouri River?

MR. McELROY: I'd object to the question in terms of the characterization of the land as adjacent. That's what this case is all about.

THE COURT: Perhaps the question could, well, of course adjacent, it's geographically adjacent regardless of what -- I guess with the understanding that I won't -- I can understand that where nature or where something is there, why, I won't permit anyone

to characterize it in a way that would be improper and without foundation. Maybe this is just a handy way to describe what you're talking about.

MR. GUHIN: I could describe the lands as the taken area.

Q Do you have any agreements with the Corps of Engineers to enhance fish and wildlife conditions on the take area?

A Not to my knowledge, no.

Q Have you ever done any wildlife enhancement on fee lands?

A No, I don't believe so.

Q Ms. Miner, since 1981 when you were land director have you had any complaints about any non-Indian going into a grazing area and making trouble for cattle?

A No I have not received any calls.

Q And that would be true both on trust lands, fee lands and Corps of Engineers lands?

A Yes.

Q How often are the Corps of Engineers lands inspected to see if somebody is messing with the cattle?

A I don't think I can answer that. The Bureau of Indian Affairs is responsible for monitoring those permits.

Q You don't take any responsibility for that, is that right?

A Not for monitoring the permits, no.

Q Ms. Miner, going back to November of 1988 was it your interpretation -- was it your understanding of Tribal authority at that time was that the Tribe could set a season that was open to members and closed to non-members on the Corps lands?

A Yes it was.

Q And the same would be true of fee lands, is that right?

A That's correct.

Q And the same true on the waters of the Missouri?

A Yes.

Q Ms. Miner, have you ever had any trespass complaints in your position as fish and wildlife director or as land director?

A Trespass on --

Q Trespass complaints?

MR. McELROY: Perhaps we could have one question at a time, Your Honor. Once for the different positions.

THE COURT: Yes.

Q Have you had any complaints about trespass since you've been Game, Fish and Parks director?

A Not that I recall.

Q Have you had any complaints as land director with regard to trespass?

A I haven't received calls. However, I have been informed of trespass.

Q You didn't receive any calls in your official capacity, is that what you're saying?

A That's correct.

Q Does the Tribe since you've been Game, Fish and Parks director do any stocking on the Missouri River?

A No.

Q Do any fish surveys like for species composition or reproduction on the Missouri River?

A No. Again we have not had the funding and we have not had a wildlife biologist on the staff.

Q It doesn't do any management on the Missouri River, does it?

A Not at this time, no.

Q Does the Tribe have any docks or ramps going into the Missouri River?

A No we do not.

Q Do you do any licensing of the boats?

A No we do not.

Ducheneaux Trial Transcript
[p. 548, l. 25; p. 549; p. 550, l. 1]

Q Mr. Ducheneaux, do you know of any non-Indian who has ever been prosecuted in civil or criminal court of the Tribe on a hunting or fishing violation?

A Not to my knowledge, no.

Q Mr. Ducheneaux, is it your position before this Court's order was entered, first orders were entered that the Tribe could cut off a season on Corps of Engineers land or fee land to non-Indians and at the same time have it open to Indians?

A Say again, would you?

Q Let me ask the question a different way. Is it your position that before this litigation commenced that the Tribe could, if it desired, cut off a deer season for example on Corps of Engineers land for non-Indians but have an open deer season for Indians on Corps of Engineers land?

A Yes, sir.

Q Is the same true as to fee lands?

A Within the boundaries of the reservation, yes, sir.

Q And is the same true with the Missouri River waters adjoining the reservation or adjoining around the reservation as you care to see it?

A Those within the boundary, sir.

Q Is your answer yes?

A Yes, sir.

Q That you could cut off the season to non-Indians and leave it open for Indians?

A Yes.

Betts Trial Transcript

[p. 839, ll. 20-25; p. 840, ll. 1-2]

Q Looking still at Exhibit No. 89 I notice, looking at the table of contents and then looking through the document itself that there's nothing on the management of the fisheries, is that correct?

A No, there is not.

Q You were not asked to get involved in the fisheries?

A No. That was not part of the plan. It was strictly for wildlife species.

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OFFICE OF THE CLERK

No. 91-2051

In The
Supreme Court of the United States
October Term, 1992

STATE OF SOUTH DAKOTA IN ITS OWN BEHALF,
AND AS PARENS PATRIAE,

Petitioner,

v.

GREGG BOURLAND, PERSONALLY AND
AS CHAIRMAN OF THE CHEYENNE RIVER
SIOUX TRIBE AND DENNIS ROUSSEAU,
PERSONALLY AND AS DIRECTOR OF CHEYENNE
RIVER SIOUX TRIBE GAME, FISH AND PARKS,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit

BRIEF FOR PETITIONER

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QUESTION PRESENTED FOR REVIEW

DOES THE CHEYENNE RIVER SIOUX TRIBE HAVE AUTHORITY TO REGULATE NON-INDIANS HUNTING AND FISHING ON LANDS AND OVERLYING WATERS ACQUIRED IN FEE BY THE UNITED STATES FOR CONSTRUCTION AND OPERATION OF THE OAHE RESERVOIR WITHIN THE TRIBE'S RESERVATION UNDER THE FLOOD CONTROL ACT OF 1944 AND THE 1954 CHEYENNE RIVER ACT?

LIST OF PARTIES

Parties to this case are: the State of South Dakota in its own behalf and as parens patriae, Plaintiff-Petitioner; Gregg Bourland, personally and as chairman of the Cheyenne River Sioux Tribe, Defendant-Respondent; and Dennis Rousseau, personally and as director of the Cheyenne River Sioux Tribe Game, Fish and Parks, Defendant-Respondent.

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1990 United States Census of Population & Housing, Summary Tape File 1A, South Dakota, 040	26
<i>Universal Declaration of Human Rights</i> , Art. 21(1)	25

DECISIONS BELOW

The panel opinion of the United States Court of Appeals for the Eighth Circuit of November 21, 1991, in Case Nos. 90-5486, 90-5515 is reported at 949 F.2d 984 (8th Cir. 1991). The opinion appears in the Petitioner's Appendix to the Petition for Writ of Certiorari (Pet. App. A-1 – A-51).

The Memorandum Opinion dated August 21, 1990, and Judgment dated August 22, 1990, of the United States District Court for the District of South Dakota, in Civil Action No. 88-3049 are unreported and appear in the Joint Appendix (J.A. 50-151).

STATEMENT OF JURISDICTION

The judgment of the Eighth Circuit Court of Appeals was entered on November 21, 1991 (Pet. App. A-52 – A-54). The Petitioner's Petition for Rehearing and Suggestion for Rehearing En Banc were denied on March 23, 1992 (Pet. App. A-55). This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTES PRESENTED FOR REVIEW

The statutory provisions involved in this case are as follows: Section 4 of the Flood Control Act of 1944, Pub. L. No. 534, 58 Stat. 887 (1944). The provision is lengthy and is therefore not set forth here. It appears as an Appendix to the Petition for Writ of Certiorari (Pet. App. A-185). The second statute at issue is Public Law No. 870, 64 Stat. 1093 (1950). The statute appears as an Appendix to the Petition for Writ of Certiorari (Pet. App. A-187). The third statute at issue is the Cheyenne River Act of 1954, Pub. L. No. 776, 68 Stat. 1191 (1954). This act appears in the Joint Appendix (J.A. 234).¹

¹ The Petitioner has used the notation "T" to refer to the Trial Transcript and the notation "PHI" to refer to the Preliminary Hearing Transcript. The notation "Ex." refers to Trial Exhibits and the notation "PH Ex." refers to Preliminary Hearing Exhibits. In addition, the notation "PTA" followed by a letter or double letters refers to the Petitioner's four-volume Appendix to its Trial Brief below. See R 133. The notation "PRB B" refers to Appendix B to the Reply Brief of State of South Dakota to Defendants' Pretrial Memorandum. See R 157.

STATEMENT OF THE CASE

In 1944, Congress enacted the Flood Control Act of 1944, Pub. L. No. 534, 58 Stat. 887, and thus authorized the construction of several large reservoirs on the Missouri River in North and South Dakota. This case concerns whether the Cheyenne River Sioux Tribe possesses civil regulatory jurisdiction over non-Indians on lands and overlying waters acquired in fee by the United States for construction of the Oahe Reservoir in South Dakota, a principal component of the Missouri River reservoir system.

Approximately 104,000 acres of the lands at issue were acquired from Indians and the Tribe itself. In addition, eighteen thousand acres of land were acquired from non-Indians. The area acquired from Indians, the Tribe and non-Indians taken together constitutes the "taken area" and is commonly known by that name. The "taken area" constitutes not only part of the Oahe project but, in addition, constitutes the eastern land and water boundary of the Cheyenne River Sioux Reservation.

A. The Flood Control Act of 1944.

The Flood Control Act of 1944, Pub. L. No. 534, 58 Stat. 887 (1944) authorized the construction of several large reservoirs on the Missouri River for the primary purposes of controlling flooding, providing for upstream irrigation needs, and addressing downstream navigation needs. *See ETSI Pipeline Project v. Missouri*, 484 U.S. 495, 499-504 (1988). A further purpose of the reservoirs was to serve fish, wildlife and recreation needs as indicated by Section 4 of the Act which requires that the reservoirs built under the authority of the Act "shall be open to public use generally, without charge." The Act also specifies in Section 4 that

No use of any area to which this section applies shall be permitted which is inconsistent with the laws for the protection of fish and game of the State in which such area is situated.

(Pet. App. A-186).

B. Land Acquired from the Tribe and its Members.

Approximately 104,000 acres of land and overlying waters were acquired in fee by the United States from the Cheyenne River Tribe, or its members, for "construction, protection, development, and use" of the Oahe Reservoir on the Missouri River under the Cheyenne River Act of 1954, Pub. L. No. 776, 68 Stat. 1191 (1954) (J.A. 234), and the Flood Control Act of 1944. Most of this land was held in trust for the Tribe or its members at the time of acquisition, but approximately 3,000 acres were held in fee by tribal members. *Hearing of the Committee on Interior and Insular Affairs, Subcommittee of the Committee on Interior and Insular Affairs of the United States Senate; Subcommittee of the Committee on Interior and Insular Affairs of the House of Representatives on S.695, 159 (May 20, 1954) (hereinafter May 20, 1954, Hearing). (J.A. 202).* Furthermore, under Section II of the 1954 Cheyenne River Act, the United States acquired "the bed of the Missouri River so far as it is the eastern boundary of such Cheyenne River Reservation." (J.A. 236).

Legislation to allow negotiation of contracts between the Corps of Engineers and the Tribe for lands needed for construction of the Oahe Reservoir had been introduced in 1949. *See H.R. 5372*, 81st Cong., 1st Sess. (1949) (PTA J). This bill would have provided for "preservation of any treaty rights of the tribe in regard to fishing, hunting, and trapping, insofar as may be practicable under the physical conditions existing when the Oahe project is completed. . . ." *Id.* at 4. *See also S. 1488*, 81st Cong., 1st Sess. (1949) (J.A. 182-184) (PTA K). However, the language calling for preservation of treaty rights was *omitted* in the final version of Pub. L. No. 870, 64 Stat. 1093, 1094 (1950) (Pet. App. A-187, A-188), which provided that contracts made under the Act would convey to the United States,

the title to all tribal, allotted, assigned, and inherited lands or interests therein belonging to the Indians of each tribe required by the United States for the reservoir to be created by the construction of the dam across the Missouri River in South Dakota, to be known as the Oahe Dam, including such lands along the margin of said reservoir as may be

required by the Chief of Engineers, United States Army, for the protection, development, and *use* of said reservoir.

(Emphasis supplied.)

The negotiating effort, however, was unsuccessful, and the entire matter was resubmitted to Congress with negotiations continuing between the parties. The Tribe made several proposals but ultimately demanded \$12,632,354, carefully categorizing its demands under several headings including "[l]and . . .," "[g]razing permit revenue loss" and "[l]oss of wildlife, wild fruit, etc." H.R. Rep. No. 2484, 83d Cong., 2d Sess., 5 (1954) (emphasis added) (J.A. 216) (PTA T, 5). Congress responded to these claims and, after revision of the amounts, offered a combined payment of \$5,384,000.14 for the land, for tangible future damages such as the loss of wildlife resources and grazing, and for "the bed of the Missouri River so far as it is the eastern boundary of the Cheyenne River Reservation." Pub. L. No. 776, 68 Stat. 1191 (J.A. 236). It also offered an additional \$5,160,000 for "complete rehabilitation" of all resident members of the tribe (J.A. 238-239).

The 1954 Cheyenne River Act also provided limited rights for the Tribe. Certain of these rights were of short duration. Under Section VII, the tribal members were given the right "without charge to cut and remove all timber and to salvage . . . improvements." (J.A. 241). Section IX granted the right to members to "use the lands hereby conveyed" until closure (J.A. 242). These rights expired, however, after notice given by the Chief of Engineers of the impending impoundment of the reservoir. Section IX (J.A. 243). Two sections of the Act recognize permanent rights or privileges. Section VI reserves "mineral rights" to the Tribe or individual owner "as their interest may appear under Section I hereof." (J.A. 240). In other words, to the extent that an Indian or the Tribe had an ownership in the land prior to the taking, mineral rights would be reserved for him or it. These rights were "subject to all reasonable regulations which may be imposed by the Chief of Engineers . . . for protection and *use* by the United States of the taking area for the purposes of the Oahe Dam and Reservoir." *Id.* (Emphasis added.)

Section X provided that the Tribe and its members would have the right to graze stock on the taken area. It also provided

The said Tribal Council and members of said Indian Tribe shall have, without cost, the right of free access to the shoreline of the reservoir-including the right to hunt and fish in and on the aforesaid shoreline and reservoir, *subject, however, to regulations governing the corresponding use by other citizens of the United States.*

(J.A. 244) (emphasis added). Public Law 776 was effective only upon confirmation and acceptance in writing by "three-quarters of the adult Indians of the Cheyenne River Reservation in South Dakota." (J.A. 234). One thousand nine hundred forty-two ballots were ultimately cast of which 1,790 or ninety-two percent were cast "for approval of Public Law 776." (J.A. 266) (PRB B). Of the 2,375 persons eligible to vote, 75.35 percent voted to approve Public Law 776. *Id.* Therefore, the land was transferred in fee to the United States after acceptance by the Tribe of Public Law 776.

C. Lands Acquired from Non-Indians.

In addition to the approximately 104,000 acres acquired from the Tribe and its members, approximately 18,000 acres were acquired from non-Indians under the Flood Control Act of 1944 in the "taken area." See H.R. Rep. No. 1047, 81st Cong., 1st Sess., 3 (1949) (Comments of the Department of Interior) (J.A. 185) (PTA O, 3). The record does not reflect how these lands originally came into non-Indian ownership.² Non-Indians did not receive the same kinds of damage payments as Indians nor did they receive rehabilitation funds.

² The lands could have come into non-Indian ownership through the General Allotment Act of 1887 as incorporated in the 1889 Sioux Act. Alternatively, they could have come into non-Indian hands through other statutes including those set out in *County of Yakima v. Yakima Nation*, ___ U.S. ___, 116 L.Ed.2d 687, 705 (1992). See 25 U.S.C. §§ 320, 379, 404 and 405.

See, e.g., May 20, 1954 Hearing, *supra* at 160 (J.A. 202-203) (PTA RR, 160).

D. Subsequent History of the Taken Area.

In the years following the taking, the State of South Dakota vigorously managed the waters and lands of the taken area. With regard to the Oahe fishery, the State has closely monitored the changes in habitat and morphology which occurred as a result of the creation of the reservoir, *see, e.g.*, (T 9, 131-134) (J.A. 333), and has refined its management accordingly. For example, as the District Court found, South Dakota stocked about 72 million fish in the reservoir from 1970 through the time of trial in 1988 (J.A. 78). *See* (Ex. 114). Further, the District Court noted the "numerous" studies the State conducts on the reservoir (J.A. 78). Studies include reservoir fish population surveys, catch rate studies, harvest rate studies and studies of the introduction of fish (J.A. 78). Fishery studies are used in regulatory decision making, i.e., size and number limits for fishing. *See id.* The State has closely monitored the progress of the pallid sturgeon (T 104-105) (J.A. 338-341), a fish species in the process of being listed as endangered (T 109). *See also* DCO (District Court opinion) (J.A. 78-79). Through South Dakota's management, the Oahe walleye and northern pike fishing has been developed into an asset with a national reputation. *See* DCO (J.A. 78). *See also* (T 100-101) (J.A. 338). The State has also developed a small mouth bass population which is expected to become self-sustaining (T 25).

Finally, the District Court found that South Dakota "furthers fishery management" through "[e]nforcement of fishing regulations." (J.A. 79). This includes, of course, regular law enforcement activities such as arrest and imposition of sanctions on the fishery. *See* (PHT 146-147, T 304-305, Ex. 140). As biologist Robert Hanten stated: "If there were no regulations and there were no enforcement there would be uncontrolled exploitation of the fish population." (T 8) (J.A. 332); *see also* (T 65, 67) (J.A. 334-335).

Likewise, the State engages in sophisticated game management including law enforcement throughout the fee land and taken area land. As the District Court found:

The State has a large staff of highly educated and experienced wildlife conservation personnel. The wildlife surveys for the area are comprehensive scientific tools for monitoring harvest and population data. State programs for habitat improvement, depredation control, and wildlife conservation, including pervasive law enforcement measures and field-level recommendations by conservation officers, have been successful in promoting manageable wildlife populations in Dewey and Ziebach counties.

(J.A. 77). *See* (PHT 78-79; T 364). *See also* as to law enforcement on taken area land, DCO (J.A. 66, 79) (PHT 127, 144-146, T 442, 444, Ex. 140).

The Tribe, in contrast, has done little if anything to contribute to the management of the taken area. With regard to the Missouri River, a BIA researcher stated in Lawson, *Reservoir and Reservation: the Oahe Dam and the Cheyenne River Sioux*, 37 S.D. Historical Collections 102, 158 (1974):

Though the river contained a wide variety of fish, the Indians never learned to exploit this food source and forms of water recreation such as swimming and boating were also uncommon activities.

Similarly, House and Senate Reports made it clear that "[f]ishing is not important on either reservation at the present time." H.R. Rep. No. 1047, 81st Cong., 1st Sess., 4 (1949) (J.A. 186) (PTA O, 4). *See also* S. Rep. No. 1737, 81st Cong., 2d Sess., 5 (1950) (PTA N, 5). At the time the litigation was commenced the Tribe had never done *any* stocking of fish on the Missouri River, had never done fish surveys, species composition surveys or reproduction surveys on the Missouri River, and had no docks or ramps going to the Missouri River. *See* (T 506-507) (J.A. 361-362), (T 520-521) (J.A. 379); *see also* DCO (J.A. 74, 76). The Tribe admitted that it had no plans for development of the Missouri River fishery at the

time of trial of this matter even though it presented a newly adopted wildlife plan to the court at that time (T 839-840) (J.A. 381-382).

Tribal management of wildlife was virtually nonexistent throughout the reservation at the time the litigation was brought. The District Court found at (J.A. 74):

Until 1989, no ongoing fish or wildlife surveys for the collection of harvest and population data were conducted by the tribal game, fish and parks department. Also, the Tribe had no established conservation, depredation, or stocking programs to protect and enhance existing fish and wildlife resources.

See also (T 509-521) (J.A. 362-379).

At the time of trial, no non-Indian had ever been prosecuted in a civil or criminal court of the Tribe for a hunting or fishing violation on any area of the reservation including, necessarily, the taken area lands and waters. See (T 517-518) (J.A. 373-375) (T 548-549) (J.A. 380).³

E. Commencement of the Litigation.

This litigation was begun by the State when the Tribe broke off negotiations on a proposed agreement and announced to the local media

Due to the state of South Dakota's intransigence, all hunters must now hold a Cheyenne River Sioux tribal hunting license to hunt on *any and all lands* within the exterior boundaries of the reservation.

³ The District Court made a general finding that the Tribe "enforced its [hunting and fishing] regulations against all violators" on the lands in dispute (J.A. 66). The court, however, made no findings as to the frequency, vigor or manner of the tribal enforcement. (See, as to the low level of tribal activity, the District Court Memorandum Opinion which denied a preliminary injunction, at Pet. App. A-171). The Court of Appeals did not analyze these District Court's findings, nor did it adjudge the appropriate meaning or weight to be given them in a *Montana-Brendale* analysis presumably because its principal analysis was based on *United States v. Dion*, 476 U.S. 734 (1986), as set forth below.

The state licenses will no longer be honored and violators are subject to prosecution in tribal court.

DCO (J.A. 58) (emphasis added).

In response to this threat, the District Court granted a temporary restraining order blocking the tribal officers from restraining "non-Indians possessing state hunting licenses from hunting on non-Indian or public lands within the Cheyenne River Sioux Indian Reservation." (Pet. App. A-183).

F. Decisions Below.

The District Court found, on the merits, that the Tribe had no civil regulatory jurisdiction over non-Indians hunting or fishing on any of the taken area.⁴ (J.A. 149-150). The District Court applied the "general principle" of *Montana* to the taken area, stating that "unless Congress expressly delegated civil jurisdiction to the Cheyenne River Tribe over nonmember hunting and fishing on the taken area and the nonmember fee lands, no such authority exists in the Tribe." (J.A. 117-118). Finding no such delegation in the Cheyenne River Taking Act of 1954 or in other legislation, the District Court held that the Tribe had no civil regulatory jurisdiction over non-Indians on the taken area.

The District Court also found, in considering the *Montana* "exceptions," that the "taken area and fee lands are not substantial food sources for tribal members," (J.A. 70) and that "[t]ribal regulation of nonmember fishing on the shoreline of the taken area is not necessary to protect fishing by

⁴ The District Court also found that the Tribe did not have civil regulatory jurisdiction over non-Indians on fee land on the main portion of the reservation (J.A. 121). The Tribe did not appeal this determination. In addition, the District Court found that the reservation had not been diminished by the 1954 Taking Act (J.A. 103-104); the State did not appeal this portion of the decision. It should also be noted that the Court of Appeals overturned the holding of the District Court that the Tribe did not have civil regulatory jurisdiction over nonmember Indians. The Court of Appeals found that the issue had not been properly raised below. *Bourland*, 949 F.2d at 989-990 (Pet. App. 18-19).

tribal members for subsistence purposes." (J.A. 70). The District Court likewise found that "[t]ribal regulation of non-member hunting on the taken area and nonmember fee lands is not necessary to protect hunting by tribal members for subsistence purposes." (J.A. 68). Further, it found that "[g]enerally, nonmembers hunting and fishing on the reservation have conducted themselves in a manner that does not threaten the legitimate tribal concerns for livestock grazing and the protection of other property." (J.A. 71). The court concluded that "the Tribe need not regulate the hunting and fishing activities of nonmembers on the taken area . . . to protect its political integrity, economic security or health or welfare." (J.A. 81-82). *See also* (J.A. 149).⁵

The Court of Appeals for the Eighth Circuit affirmed in part, reversed in part and remanded in part. The Court of Appeals drew a sharp distinction between lands acquired from the Tribe and its members and lands acquired from non-Indians. The Court of Appeals reversed the District Court and found that the Tribe could exercise civil regulatory jurisdiction over non-Indians on the approximately 104,000 acres of land and overlying waters taken from Indians by the United States for construction and operation of the Oahe reservoir under the Cheyenne River Act, Pub. L. No. 776, 68 Stat. 1191 (1954) (Pet. App. A-195). The Court of Appeals refused to rely upon this Court's decisions involving tribal assertions of civil regulatory jurisdiction over non-Indians on fee land: *Montana v. United States*, 450 U.S. 544 (1981) and *Brendale v. Confederated Bands and Tribes of the Yakima Indian Nation*, 492 U.S. 408 (1989). *Bourland*, 949 F.2d at 990, 994 and n.18 (Pet. App. A-26, 27, 39-41 and n.18). Instead, the

⁵ The District Court also addressed the issues raised by the opinion of Justices Stevens and O'Connor in *Brendale*, 492 U.S. at 433-448, and found that "Neither the taken area nor the fee lands constitute a pristine area. The Tribe has never denied general nonmember access to the taking area or fee lands nor does the Tribe monitor nonmember access to the taken area or fee lands. In addition, there has been no showing by the Tribe that unique cultural, spiritual, or religious significance attaches to the taken area or fee lands." (J.A. 79).

Court of Appeals analyzed the jurisdictional issue principally in terms of *United States v. Dion*, 476 U.S. 734 (1986), a case involving abrogation of a treaty right of an Indian to hunt eagles. *Bourland*, 949 F.2d at 994 (Pet. App. A-40). Applying the *Dion* standard, the Court of Appeals concluded that the Tribe "retains" civil regulatory authority over non-Indians on lands acquired from Indians in the taken area because Congress had not, in acquiring these lands, expressly considered the conflict between its actions and treaty rights and had not expressly abrogated the treaty right. *Bourland*, 949 F.2d at 994 (Pet. App. A-40 - 41).

The Court of Appeals addressed the 18,000 acres of the taken area property acquired in fee from non-Indians in a decisively different manner. The circuit court remanded the issue of whether the Tribe had civil regulatory jurisdiction over non-Indians on the taken area property acquired from non-Indians in fee. The District Court was directed to make a new analysis of the existence of the *Montana* "exceptions." (Pet. App. A-46 n.20, -51).

SUMMARY OF ARGUMENT

1. *Montana v. United States* and *Brendale v. Confederated Tribes* establish that a tribe's claim to civil regulatory jurisdiction must flow either from positive federal law, such as a treaty, or from the inherent sovereignty of the tribe. These cases also establish that a treaty right to regulate non-Indians can exist, if it exists at all, only on lands over which the tribe has "absolute and undisturbed use and occupation." *Montana v. United States*, 450 U.S. at 559.⁶ One hundred four thousand acres of land in this case were acquired from the Tribe and its members under the authority of the Flood Control Act of 1944 and the Cheyenne River Act of 1954. Pursuant to Section 4 of the Flood Control Act of 1944 and to

⁶ *Montana* does not hold that a right to regulate can be derived from a treaty right to exclude; this derivation was treated as only an "arguable" one in *Montana*, 450 U.S. at 558-559. There does not appear to be any precedent of this Court squarely analyzing or deciding this issue.

Section X of the 1954 Cheyenne River Act, the Tribe no longer retains "absolute and undisturbed use" of these lands for they are open for public use for hunting and fishing under these Acts. It necessarily follows that the Tribe can have no power emanating from the treaty to regulate non-Indians on these lands and overlying waters. Nor can the Tribe exercise authority over non-Indians on these lands as a component of its inherent sovereignty. Under *United States v. Wheeler*, 435 U.S. 313 (1978), *Montana* and *Brendale*, it is clear that the inherent sovereignty of the Tribe extends only to its *internal* relations, i.e., the relations of the Tribe and its members. The inherent sovereignty of the Tribe does not extend to its external relations, for that authority has been divested. It follows, therefore, that the Tribe can have no civil regulatory jurisdiction over non-Indians on the lands and overlying waters acquired from the Tribe or its members under the two acts, under either the treaty power or the inherent sovereignty power.

2. The Court of Appeals consequently erred when it refused to apply the reasoning of *Montana* and *Brendale* to the issue of whether a tribe retains civil regulatory jurisdiction over non-Indians on the taken area. The apparent grounds for the refusal was that the Cheyenne River Act of 1954 was not enacted with the "destruction" of tribal government in mind. Such a purpose is not required under *Montana* or *Brendale*. Furthermore, even if the ultimate "destruction" of the tribal government is required to be a goal prior to application of *Montana* and *Brendale*, such was the case with the 1954 Cheyenne River Act as indicated by its legislative history. In addition, the minor rights and privileges retained by the Tribe in the taken area do not provide grounds for distinguishing *Montana*.

3. The Court of Appeals also erred in applying the reasoning of *United States v. Dion* to the matter of tribal civil regulatory jurisdiction over non-Indians. *Dion* addresses a distinct issue: whether the tribe and its members retain a right to engage in a particular nongovernmental activity, i.e., eagle

hunting. *Montana* and *Brendale* are directed to the far different issue of whether the tribe maintains civil regulatory jurisdiction over nonconsenting non-Indians and nonmembers. Application of *Dion* to the *Montana-Brendale* situation would undermine the logic and conceptual clarity of those cases. Alternatively, even if *Dion* is applicable to this situation, the Court of Appeals failed to find the 1954 Cheyenne River Act was the legal equivalent of the Eagle Protection Act. In the 1954 Cheyenne River Act, Congress specified that the Tribe would have but a right of "access" to hunt and fish on the taken area subject to "regulations governing the corresponding use by other citizens of the United States." By specifying the rights that the Tribe and its members would have after adoption by Congress and approval by the Tribe of Public Law 776, Congress precluded a claim that the Tribe *itself* could regulate others on that same taken area, under the *Dion* holding. The nonexclusive right to access is a far cry from the right to regulate.

4. Finally, the Court of Appeals erred in not applying the rule of *Montana-Brendale* as set forth above to the eighteen thousand acres of the taken area which were acquired from non-Indians. Under the rule of *Montana-Brendale*, the Tribe lost any claim to jurisdiction when the original acquisition by non-Indians took place. There is no arguable claim that the Tribe somehow *regained* jurisdiction by virtue of acquisition of these lands from non-Indians by the United States.

ARGUMENT

I

MONTANA v. UNITED STATES AND BRENDALÉ v. CONFEDERATED TRIBES AND BANDS PROVIDE THE APPROPRIATE STANDARD FOR DETERMINING WHETHER A TRIBE HAS CIVIL REGULATORY JURISDICTION OVER NON-INDIANS ON LANDS AND OVERLYING WATERS ACQUIRED IN FEE BY THE UNITED STATES IN THE TAKEN AREA.

Montana v. United States, 450 U.S. 544 (1981) and *Brendale v. Confederated Tribes and Bands of the Yakima Indian*

Nation, 492 U.S. 408 (1989) set out the appropriate test for determining whether non-Indians are subject to the civil regulatory authority of the Tribe on lands no longer held in trust for the Tribe and its members, regardless of whether the land was acquired from Indians or non-Indians. That test is clear. A tribe has no "arguable"⁷ claim to civil regulatory power over non-Indians under the treaty power unless the tribe maintains "absolute and undisturbed use and occupation" of the lands involved. Likewise, a tribe has no civil regulatory jurisdiction over non-Indians under its inherent sovereignty because the tribe has been divested of its authority over its "external relations" or its relations with non-Indians.

A. *Montana v. United States* Establishes that the Tribe has no Civil Regulatory Jurisdiction over Non-Indians on Non-Indian land, Either Under the Treaty Power or Inherent Sovereignty.

In *Montana v. United States*, 450 U.S. 544 (1981), this Court focused its attention on whether and under what conditions a tribe could exercise civil regulatory jurisdiction over non-Indians on non-Indian land. The question presented was, in particular, whether the tribe could exercise civil regulatory authority for hunting and fishing purposes on fee lands which had been acquired under the General Allotment Act of 1887 and the Crow Allotment Act.

The Court considered two potential "sources" for tribal regulatory authority – positive federal law, i.e., treaty,⁸ and the inherent sovereignty of the tribe.

⁷ Again, it is necessary to assume that a tribe may derive a power to regulate from a treaty power to exclude, an "arguable" proposition, *Montana v. United States*, 450 U.S. at 558-559. As the Brief of Amici States points out, treaties were negotiated to insulate the Indians from non-Indians. Implying a power to regulate non-Indians not expected to reside on or even enter the reservation is inconsistent with the basic premise of the treaties.

⁸ The Court also considered and rejected the argument that 18 U.S.C. § 1165 conferred or "augmented" the tribe's regulatory authority. *Montana*, 450 U.S. at 561-562.

1. A tribe cannot make even an arguable claim to civil regulatory jurisdiction over non-Indians under the treaty power unless it maintains exclusive use of the lands involved.

Montana clearly sets out the rule for determining whether a tribe may exercise jurisdiction over non-Indians on a reservation under a treaty power, assuming such power may be derived from the tribal exclusivity provision. The rule is that a tribe may not exercise civil regulatory jurisdiction over non-Indians on any lands over which it does not have "absolute and undisturbed use and occupation" under a treaty provision.

The treaties analyzed in *Montana* are directly relevant to this case. The first treaty relied upon in *Montana* was the Treaty of Fort Laramie of 1851, 11 Stat. 749 (1851); 2 Kappler 594. Both the rights of the Crow at issue in *Montana* and the rights of the Cheyenne River Sioux at issue in this case were addressed by this treaty. According to this Court, only Article V of the Fort Laramie Treaty referred to hunting and fishing

and it merely provided that the eight signatory tribes [including the Crow and Sioux] "do not surrender the privilege of hunting, fishing, or passing over any of the tracts of country heretofore described." 2 Kappler 595. The treaty nowhere suggested that Congress intended to grant authority to the Crow Tribe to regulate hunting and fishing by nonmembers on nonmember lands.

Montana v. United States, 450 U.S. at 558 (footnote omitted). The 1851 Treaty gave no support to the Crow claim in *Montana* and gives no support to the claim of the Sioux in this case that a right had been granted or reserved to the Tribe to regulate hunting and fishing by nonmembers on nonmember lands.

The second treaty at issue in *Montana* was the 1868 Fort Laramie Treaty, 15 Stat. 649 (1868); 2 Kappler 1008. According to the Court, Article II of this treaty established a reservation for the Crow Tribe and provided that it be

"set apart for the *absolute and undisturbed use and occupation* of the Indians herein named, and for

such other friendly tribes or individual Indians as from time to time they may be willing, with the consent of the United States, to admit amongst them . . . ,” (emphasis added) and that “the United States now solemnly agrees that no persons, except those herein designated and authorized to do so . . . shall ever be permitted to pass over, settle upon, or reside in the territory described in this article for the use of said Indians. . . .”

Montana v. United States, 450 U.S. at 558 (quoting 15 Stat. 649). The Treaty with the Sioux Indians was signed on April 29, 1868, less than two weeks before the second Fort Laramie Treaty with the Crow Indians. The provision relating to exclusive use is almost identical to that used with regard to the Crow Indians.⁹ According to the Court in *Montana*, this treaty language, by obligating “the United States to prohibit most non-Indians from residing on or passing through reservation lands used and occupied by the tribe” had the effect of

⁹ The Sioux Treaty states that the described country is set apart for the *absolute and undisturbed use and occupation* of the Indians herein named, and for such other friendly tribes or individual Indians as from time to time they may be willing, with the consent of the United States, to admit amongst them; and the United States now solemnly agrees that *no persons except those herein designated and authorized to do so*, and except such officers, agents, and employes of the Government as may be authorized to enter upon Indian reservations in discharge of duties enjoined by law, *shall ever be permitted to pass over, settle upon, or reside in the territory described in this article*, or in such territory as may be added to this reservation for the use of said Indians, and henceforth they will and do hereby relinquish all claims or right in and to any portion of the United States or Territories, except such as is embraced within the limits aforesaid, and except as hereinafter provided.

Treaty with the Sioux Indians, 15 Stat. 535, 536 (Apr. 29, 1868); 2 Kappler 998 (emphasis added).

“arguably” conferring “upon the Tribe the authority to control fishing and hunting on those lands.” *Montana*, 450 U.S. at 558-559.

The Court went on to hold, critically,

But that authority could only extend to land on which the Tribe exercises “absolute and undisturbed use and occupation.”

450 U.S. at 559. This Court thus found that when a tribe did not have “absolute and undisturbed use” of land, the power “arguably” created or reserved under the 1868 Treaty to “control fishing and hunting on those lands” no longer existed. The Court pointed to the substantial reduction in “such land,” 450 U.S. at 559, as a result of the allotment and alienation of land under the General Allotment Act and the Crow Allotment Act of 1920. The Court concluded that

If the 1868 treaty created tribal power to restrict or prohibit non-Indian hunting and fishing on the reservation, that power cannot apply to lands held in fee by non-Indians.

Montana, 450 U.S. at 559 (footnote omitted). The same result follows under the near mirror image language of the Treaty of Sioux Indians, *see* n.9 *supra*, at issue here.

2. *Montana* establishes that a tribe has no jurisdiction over non-Indians on non-Indian lands under its inherent sovereignty because such inherent sovereignty has been divested.

Montana also examined whether the tribe, as “an incident of the inherent sovereignty of the tribe” could “regulate non-Indian hunting and fishing on non-Indian lands within the reservation.” 450 U.S. at 563. Approaching this issue, the Court examined the principles set out in *United States v. Wheeler*, 435 U.S. 313 (1978) which distinguished between inherent sovereignty over external relations, or relations between the tribe and nonmembers of the tribe – and inherent sovereignty over internal relations or, in other words, relations among members of the tribe.

The Court found that the “areas in which such implicit divestiture of sovereignty has been held to have occurred are

those involving *the relations between an Indian tribe and nonmembers of the tribe. . . .* " *Montana*, 450 U.S. at 564 (quoting *Wheeler*, 435 U.S. at 326) (emphasis added in *Montana*). The Court explained, again quoting *Wheeler*,

"These limitations rest on the fact that the dependent status of Indian tribes within our territorial jurisdiction is necessarily inconsistent with their freedom independently to *determine their external relations.*"

Id. (emphasis added in *Montana*). This Court stated that the exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation.

Montana, 450 U.S. at 564.

Montana thus established a general rule for determining when a tribe might have civil regulatory jurisdiction over non-Indians, a rule which carefully takes into account both treaty rights and inherent rights.¹⁰

3. *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation* reaffirms and refines the rule of *Montana*.

Brendale, like *Montana*, examines the treaty power and the inherent sovereign power of the tribe to determine the circumstances under which a tribe may impose civil regulatory jurisdiction over non-Indians. The *Brendale* plurality thus first examines whether the Treaty of the Yakima Nation with the United States established tribal authority to regulate fee land owned by nonmembers within the reservation. As in *Montana*, the basis for the treaty argument was language

¹⁰ The two *Montana* "exceptions" arguably justifying a tribal claim of inherent sovereign authority are addressed in the section immediately below.

which stated that particular property would be set apart "for the exclusive use and benefit" of the tribe, and that no "white man excepting those in the employment of the Indian Department, [shall] be permitted to reside upon the said reservation without permission of the tribe." *Brendale*, 492 U.S. at 422. The plurality found that the Yakima Nation could not rely upon "this power to exclude" because the tribe

no longer retains the "exclusive use and benefit" of all the land within the reservation boundaries established by the treaty with the Yakimas.

Brendale, 492 U.S. at 422. According to the *Brendale* plurality, significant portions of the Yakima Indian Reservation had been allotted under the General Allotment Act, and had passed to non-Indians. Quoting *Montana*, the *Brendale* plurality stated that

"treaty rights with respect to reservation lands must be read in light of the subsequent alienation of those lands."

Brendale, 492 U.S. at 422 (quoting *Montana*, 450 U.S. at 561). The *Brendale* plurality also found that the *Montana* court

flatly rejected the existence of a power, derived from the power to exclude, to regulate activities *on lands from which tribes can no longer exclude non-members.*

Brendale, 492 U.S. at 424 (emphasis added).

The four justice plurality also examined whether the tribe had a power emanating from its "inherent sovereignty" to regulate nonmembers on non-Indian lands. *Brendale*, 492 U.S. at 425. As in *Montana*, the Court distinguished between inherent sovereignty with regard to external relations, or relations with nonmembers – and inherent sovereignty with regard to internal relations. The *Brendale* plurality found

A tribe's inherent sovereignty, however, is divested to the extent it is inconsistent with the tribe's dependent status, that is, to the extent it involves a tribe's "external relations."

Brendale, 492 U.S. at 425-426 (quoting *United States v. Wheeler*, 435 U.S. at 336).

The *Brendale* plurality also examined *Montana*'s "two 'exceptions' to its general principle" regarding the inherent sovereignty of the tribe. 492 U.S. at 428. The first "exception" relating to consensual relations was not alleged to be present.¹¹ The *Brendale* plurality then examined the second *Montana* "exception" that

"[a] tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe."

492 U.S. at 428 (quoting *Montana v. United States*, 450 U.S. at 566.) The *Brendale* plurality rejected the broad reading of the Ninth Circuit that "all conduct that 'threatens or has some direct effect on the political integrity, the economic security or the health or welfare of the tribe'" gave rise to tribal jurisdiction. 492 U.S. at 429. Such an approach, according to the *Brendale* plurality, equated the tribe's "retained sovereignty with a local government's police power, which is contrary to *Montana* itself." 492 U.S. at 429. The *Brendale* plurality thus found that

The governing principle is that the tribe has no authority itself, by way of tribal ordinance or actions in the tribal courts, to regulate the use of fee land.

492 U.S. at 430.

¹¹ The results of the three major cases regarding tribal civil regulatory jurisdiction leading up to *Brendale* can be reconciled on the basis of consent to tribal civil jurisdiction through entry onto trust land. In *Washington v. Confederated Tribes*, 447 U.S. 134, 152 (1980), this Court found tribal jurisdiction to impose a tax on a transaction "occurring on trust lands." In *Montana*, the Court held against tribal jurisdiction on non-Indian lands but found also that the tribe could regulate non-Indians on "land belonging to the tribe or held in trust for the tribe." 450 U.S. at 557. In *Merrion v. Jicarilla Tribe*, 455 U.S. 130, 133 (1982), the non-Indian company which had contracted with the tribe and which had entered on "tribal trust property," was liable for a tribal tax.

The *Brendale* plurality thus concluded that the *Montana* second exception did not give rise to tribal court jurisdiction¹² and that federal common law created an interest protectible both in state and federal tribunals. It also noted that when the impact of a particular non-Indian activity was "demonstrably serious" and imperiled the political integrity, economic security, or health and welfare of the tribe, a *federal court* would have jurisdiction of a cause of action to restrain such activity.

Thus, the *Brendale* plurality completed the task begun in *Montana* of setting out a bright-line rule as to when the tribe would have civil regulatory jurisdiction over non-Indians.¹³

¹² Even if the *Montana* second exception *could* give rise to tribal civil regulatory jurisdiction, it would not so operate in this case given the District Court's extensive findings on the issue, and especially the finding that the Tribe "need not regulate the hunting and fishing activities of nonmembers on the taken area . . . to protect its political integrity, economic security, or health or welfare." (J.A. 81-82). *See also* (J.A. 70, 71, 75, 149).

¹³ *Montana* and *Brendale* do not preclude tribal jurisdiction over non-Indians in all situations. Tribal jurisdiction may exist when the nonmember has *consented* to jurisdiction of the tribal government or tribal courts. *See supra* n. 11. The case for consent will presumably be the strongest when the non-Indian has voluntarily and knowledgeably entered onto trust land or when the non-Indian has consented to tribal jurisdiction in a contract. Tribal civil regulatory jurisdiction over non-Indians may also exist when Congress delegates such jurisdiction to the tribe, although such delegation must be consistent with the principles set out in *Duro v. Reina*, 495 U.S. 676, 693-694 (1990).

4. **Application of the bright-line *Montana-Brendale* rule precludes a tribal claim to civil regulatory jurisdiction over non-Indians on the taken area property acquired from the Tribe and its members in this case.**

As demonstrated above, the first prong of the *Montana-Brendale* rule allows an "arguable" tribal claim to civil regulatory jurisdiction over non-Indians based upon a treaty right only when the land over which jurisdiction is claimed is held for the "exclusive use and benefit" of the Tribe or its members. When that underlying treaty right to such use and possession is divested, any arguable derivative right to regulate is necessarily divested.

Two statutes preclude such a claim here. Section 4 of the Flood Control Act of 1944, Pub. L. 534, 58 Stat. 889 (1944) § 4, 16 U.S.C. § 460(d) (Pet. App. A-185-A-186) requires that the "water areas of all such reservoirs shall be opened to public use generally." The 1954 Cheyenne River Act, 68 Stat. 1191 at § 10 (J.A. 244) states that

The said Tribal Council and the members of said Indian Tribe shall have, without cost, the right of free access to the shoreline of the reservoir including the right to hunt and fish in and on the aforesaid shoreline and reservoir, *subject, however, to regulations governing the corresponding use by other citizens of the United States.*

(Emphasis added.) Congress thus opened the area to non-Indians and no question exists that the Act abrogated the Tribe's right to territorial exclusivity over these lands. The Court of Appeals, in construing similar language with regard to another taking act on the Missouri River downstream of the Oahe project, stated that "the treaty right to exclusive occupation and use of reservation land is necessarily taken from an Indian tribe when a federal flood control project, which is also used for recreational activities by all persons, is constructed on the reservation." *Lower Brule Sioux Tribe v. South Dakota*, 711 F.2d 809, 826 (8th Cir. 1983). The Court of Appeals found in the case now before this Court that the Tribe was not "free entirely to exclude non-Indians" from the taken

area, even under its incorrect decision. *Bourland*, 949 F.2d at 995 (Pet. App. A-42). Accordingly, the Tribe has no civil regulatory power deriving from treaty over non-Indians in the taken area in this case.

The second prong of the *Montana-Brendale* rule allows an "arguable" claim of tribal civil regulatory jurisdiction based on the inherent sovereignty of the tribe. That inherent jurisdiction, however, extends only to a tribe's internal relations because a tribe's inherent sovereignty over external relations, or relations between a tribe and non-Indians, has been divested as a result of its dependent status. *See Montana*, 450 U.S. at 564; *Brendale*, 492 U.S. at 425-426 (White, J., concurring). Thus, the Tribe cannot claim civil regulatory jurisdiction over non-Indians on the taken area in this case.¹⁴

B. History and Policy Support the Rationale of *Montana-Brendale*.

1. **Basic principles of American democratic tradition and theory and of Indian law support the limitation of tribal authority over non-Indians.**

The historical underpinnings of the decisions in *Wheeler*, *Montana* and *Brendale* limiting assertions of tribal authority

¹⁴ The preclusion of tribal civil regulatory jurisdiction over non-Indians on the taken area is also in accord with the opinion of Justices Stevens and O'Connor in *Brendale* which views the tribal power of exclusion as giving rise to a power to regulate. *Brendale*, 492 U.S. at 433. In this case, the Tribe has no right to exclude non-Indians from the taken area land and water under Section X of the 1954 Cheyenne River Act as demonstrated above. When the power to exclude is not present, the power to regulate nonmembers is present only in a "closed" area of the reservation under the opinion of Justice Stevens. *See*, as to the use of this term, *Brendale*, 492 U.S. at 437 n.2 (Stevens, J.) The District Court found none of the characteristics of such an area to exist in the taken area. *See* (J.A. 79). *See also*, n.5, *supra*. It follows that the Tribe cannot exercise civil regulatory jurisdiction over non-Indians on the taken area under the opinion of Justice Stevens in *Brendale*.

over nonconsenting non-Indians are preconstitutional and find expression in the Declaration of Independence itself.

We hold these truths to be self-evident: that all men are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, and the pursuit of happiness. That, to secure these rights, governments are instituted among men, *deriving their just powers from the consent of the governed*. . . .

Declaration of Independence para. 2 (July 4, 1776) (emphasis added). The thesis underlining the Declaration of Independence, that governments derive their power from the consent of those who are governed,¹⁵ found an echo, the State submits, in the first Indian law case confronted by this Court. In that case, Justice Johnson, concurring in *Fletcher v. Peck*, 6 Cranch 87, 147 (1810) stated that

[t]he restrictions upon the right of soil in the Indians, amount only to an exclusion of all competitors from their markets; *and the limitation upon their sovereignty amounts to the right of governing every person within their limits except themselves*.

(Emphasis added.) Justice Johnson thus defined the scope of tribal sovereignty to extend only to the tribal members themselves, or, in other words, to those who had actually consented to tribal jurisdiction through that membership. See *Oliphant v. Suquamish Tribe*, 435 U.S. 191, 209 (1978). The logic and persuasive force of the Declaration and of *Fletcher v. Peck* found expression in the general law context in *Nevada v. Hall*, 440 U.S. 410, 426 (1979), in which this Court stated: "In this Nation each sovereign governs only with the consent of the governed." Even more recently in *Duro v. Reina*, 495 U.S. 676, 693 (1990), this Court, in the context of an Indian criminal law case, expressed the view that the

retained sovereignty of the tribe is but a recognition of certain additional authority the tribes maintain over Indians who *consent* to be tribal members.

¹⁵ The United States Constitution is itself an embodiment of that idea.

(Emphasis added.)¹⁶ Adding to the force of this argument¹⁷ is the frank recognition of this Court that tribal courts are simply different from other courts.

While modern tribal courts include many familiar features of the judicial process, they are influenced by the unique customs, languages, and usages of the tribes they serve. Tribal courts are often "subordinate to the political branches of tribal governments," and their legal methods may depend on "unspoken practices and norms." Cohen 234-335. *It is significant that the Bill of Rights does not apply to Indian tribal governments*.

Duro v. Reina, 495 U.S. at 693 (emphasis added).

Confining the scope of tribal sovereignty to its internal relations, i.e., to the relationship of the Tribe with those who consent to be its members, appropriately honors the concept of "consent of the governed" which is an integral part of American democratic theory and Indian law. It also serves the purpose of insulating nonmembers from processes which are "influenced by the unique customs, languages, and usages of the tribes," and courts which are "subordinate to the political branches" of the tribal governments.¹⁸

¹⁶ As held in *United States ex rel. Standing Bear v. Crook*, 25 Fed. Cas. 695 (CCD Neb. 1879), a member of the tribe is free to terminate the tribal relation at will. See also Tribe, *American Constitutional Law*, (2d ed. 1988) p. 1472 n.32.

¹⁷ See also *In re Duncan*, 139 U.S. 449, 461 (1891); *The Federalist* No. 39 (James Madison). The idea of consent of the governed is no longer a peculiar American one but has been embraced throughout the world. See generally, *Universal Declaration of Human Rights*, Art. 21(1).

¹⁸ In 1986, testimony was taken before the United States Commission on Civil Rights that tribal judges had been removed or suspended from office by the tribal council for their official acts. See *Hearing before the United States Commission on Civil Rights, Enforcement of the Indian Civil Rights Act, Hearing held in Rapid City, South Dakota, July 31-Aug. 1 and Aug. 21, 1986* (PTA QQ); (CRST Judge Gilbert LeBeau (removed), *id.* at 139, 149); (CRST Judge Nancy Condon (suspended), *id.* at 368-370). It is also of note that the CRST President, Wayne Ducheneaux, was unable to

Recognition of this principle also allows tribal courts proper sway over their own members who have consented to tribal governance by maintaining tribal membership; moreover, non-Indians who *do* in fact "consent" to the jurisdiction of the tribe for one or another purpose may also be brought under tribal civil regulatory jurisdiction through this "consent." See discussion at footnotes 11 and 13, *supra*.

2. Application of the *Montana-Brendale* rule in this case furthers resolution of jurisdictional disputes and promotes coherent regulation of federal lands and waters and the resources found thereon.

Not only is the bright-line *Montana-Brendale* rule internally logical and historically justified, but the adoption and endorsement of the rule here could well alleviate tensions which exist on Indian reservations throughout the West (and, in some instances, now in eastern states). Non-Indians reside, travel, do business, hunt, fish, and perform various other activities on reservations throughout the United States in their capacity as citizens of the United States. For example, according to the 1990 census statistics, 34.1 percent of the population of the Cheyenne River Sioux Reservation is non-Indian, and, of the portion of the Standing Rock Reservation which is in South Dakota, (i.e., all of Corson County), 51.5 percent is non-Indian. 1990 United States Census of Population & Housing, Summary-Tape File 1A, South Dakota, 040. As noted in *Duro*, 495 U.S. at 695, "the population of non-Indians on reservations generally is greater than the population of all Indians, members and nonmembers" Similarly, non-Indians are important property holders on reservations. The District Court found that "1,395,729 acres or 46.5 percent" of the land base on the Cheyenne River Sioux Reservation "is deeded in fee to members and nonmembers." (J.A. 64). See generally *Solem v. Bartlett*, 465 U.S. 463

recall any instance, except, perhaps, involving "638" contracts, in which the tribe had waived its sovereign immunity. (T 550).

(1984). The legitimate presence of non-Indians as residents, property owners and visitors brings with it the need to define jurisdictional parameters. Explicit application of the bright-line rule to all land not held for the "exclusive use and benefit" of the Tribe or its members could thus greatly add to the stability of reservations and the stability of the relationship between the Indian and non-Indian population by making jurisdictional outcomes more certain.

There are, moreover, special reasons to apply the bright-line *Montana-Brendale* rule to federal lands and waters and especially those of a great national waterway – the Missouri River. Members of the public utilizing massive federal projects on navigable waters should not, as a matter of public policy, be subjected to the claims of competing jurisdictions as would occur should the rule of the Eighth Circuit in this litigation be applied up and down the Missouri River.

Under the circuit court decision, for example, a boater or fisher traveling northward from Pierre, South Dakota, to the North Dakota border may encounter three different jurisdictions – that of the State, the Cheyenne River Sioux Tribe (presumably claimed to the midpoint of the channel adjoining the reservation)¹⁹ and the Standing Rock Sioux Tribe (again, presumably to midchannel). The three jurisdictions may require three different fishing and, perhaps, boating licenses.

Of even more importance is the biological effect that different take limits may have with regard to the prominent game fish, such as walleye. For example, one tribe could impose a very low limit, thereby inappropriately encouraging heavy fishing in other areas of the reservoir. Conversely, a tribe could allow very high limits on walleye or could simply

¹⁹ The tribal boundary presumably lay in the middle of the channel before the construction of the Oahe Reservoir. Whether the construction of the Oahe Reservoir, an "unnatural" event, altered that boundary is not clear. See generally *Arkansas v. Tennessee*, 397 U.S. 88 (1970); *Arkansas v. Tennessee*, 246 U.S. 158 (1918).

do little or no enforcement,²⁰ therefore seriously jeopardizing the resource available to other South Dakotans, assuming the State is unable to retain even concurrent jurisdiction in the taken area.²¹ The State demonstrated at trial the necessity of managing the entire reservoir system in South Dakota as one fishery unit. *See* (T 235-236). It follows that the management of a single reservoir as a unit is of even greater importance; fish do not observe jurisdictional boundaries. The State submits that cohesive, coherent management of the fishery in the State of South Dakota would serve the national purposes implicit in the Flood Control Act of 1944 and the 1954 Cheyenne River Taking Act, especially Section X; likewise, it will further the goals in other federal acts, such as the Fish and Wildlife Conservation Act of 1980, 16 U.S.C. § 2901 et seq., and the Fish and Wildlife Coordination Act, 16 U.S.C. § 661 et seq., which seek to promote fish and wildlife in cooperation with the states.

²⁰ The District Court found that "enforcement of fishing regulations [by South Dakota Game, Fish and Parks] also furthers fisheries management." (J.A. 79), and the record reflects that South Dakota has established and enforced regulations on the reservoirs since they began to fill (T 7-8, J.A. 331).

²¹ The Tribe successfully resisted the State's contention that the issue of state authority over non-Indians in the taken area had been properly raised in the litigation below. *See* (J.A. 107-110); *see also Bourland*, 949 F.2d at 990 n.13 (Pet. App. A-20, n.13). (The State, of course, claimed exclusive, not concurrent jurisdiction, over non-Indians.) In any event, if the tribal respondents prevail in the present litigation, the stage is set for further litigation, presumably brought by the Tribe or some other person or entity, to challenge the viability of the State's exercise of concurrent jurisdiction in the "taken area" in the hunting and fishing context. *See generally United States v. Montana*, 604 F.2d 1162, 1171 (9th Cir. 1971), *rev'd*, *Montana v. United States*, 450 U.S. 544 (1980).

3. Application of *Montana-Brendale* here assures equal treatment for all persons on property belonging to the United States.

Finally, consistent with elementary democratic principles, the Tribe has a heavy burden when it asks the federal courts to sanction the imposition of civil regulatory jurisdiction²² over non-Indians on public lands and waters when it, the Tribe, systematically excludes those non-Indians from participation in the tribal government regardless of their residence. This point takes importance in view of the finding by the District Court that:

The tribe discriminates against nonmembers in the application of its hunting and fishing programs. Discrimination in setting season limits is most obvious in the deer seasons with restrictions upon nonmembers regarding season closings and deer type, sex and age that are not applicable to member hunters. . . . The discriminatory license fees apply to nearly every animal hunted or trapped on the reservation.

(J.A. 80). In addition, this Tribe at trial asserted through its Chairman the authority to open wildlife seasons on the public

²² Although there was no evidence that the Tribe had ever actually imposed sanctions on non-Indians at the time the litigation was commenced, it is of note that the tribal ordinance in effect at that time provided that various hunting and fishing ordinance violations would be "a civil offense" (Ex. 8, p. 4) and would subject the violator to "fines," "confiscation and forfeiture of equipment, and expulsion of nonresident nonmembers from the reservation." *Id. See also* (Ex. 2, § 2.c., Tribal civil forfeiture ordinance adopted after the commencement of this litigation; Ex. 13, p. 11, 1989 Tribal Hunting, Fishing and Outdoor Recreation Code.) Under these ordinances the Tribe could presumably seize and sell expensive fishing equipment and boats used on the Missouri. Further, at the commencement of this litigation, the tribal ordinance provided for fines which ranged from two dollars per inch for fish, to fifty dollars per female pheasant, to \$300 per female deer or antelope taken without compliance with tribal law. (Ex. 7, p. 2). The tribal fine or "civil penalty" for female pheasants was increased to \$150 in 1989, and the fine for female deer or antelope was raised to \$1,000 (Ex. 13, p. 10).

"taken area" lands and waters itself to its members and to close them to nonmembers.²³ (T 549-550) (J.A. 380-381).

The State, in sum, submits that the bright-line rule of *Montana-Brendale* is justified by history, precedent, and reason. The rule should be applied to the taken area and to all public lands and waters of the United States.

²³ The Court of Appeals did state the following in its opinion: This is not to say, however, that the Tribe is free entirely to exclude non-Indians from hunting and fishing on the portion of the taken land over which it has control. The Tribe's "right to hunt and fish in and on the [Oahe Dam] shoreline and reservoir [is] subject, however, to regulations governing the corresponding use by other citizens of the United States." Cheyenne River Act, 68 Stat. 1193. Further, Section Four of the Flood Control Act requires that the "water areas of all such projects shall be open to public use generally." 16 U.S.C. § 460d. It appears, then, that the Tribe may not enact a flat ban on non-Indian hunting or fishing on the portion of the taken area subject to tribal jurisdiction, nor may it impose unreasonably discriminatory limits on such activities. The scope of the Tribe's regulations are not presently at issue, however, and so we decline to address this question further.

Bourland, 949 F.2d at 995 (Pet. App. A-42 – A-43). The court thus derived from Section X of the Cheyenne River Act and Section 4 of the Flood Control Act some limitations on tribal power. In particular, the circuit court apparently read language that the "Tribe's 'right to hunt and fish in and on the [Oahe Dam] shoreline and reservoir [is] subject, however, to regulations governing the corresponding use by other citizens of the United States' " to be a limitation on the Tribe's power over non-Indians. *Bourland*, 949 F.2d at 995 (Pet. App. A-42). The reading is perplexing, however, because this language clearly limits the right of the *Tribe and its members to hunt and fish* and does not address the right of *others to hunt and fish*. The circuit court's statements that the Tribe might not enact a "flat ban" on non-Indian hunting and fishing nor may it "impose unreasonably discriminatory limits on such activities," *Bourland*, 949 F.2d at 995 (Pet. App. A-43), are not particularly comforting to the State for they do, apparently, countenance bans less than "flat" and discrimination which is less than "unreasonable."

C. *Montana and Brendale* are not Distinguishable.

Two arguments have been raised in an attempt to distinguish the situation now before this Court from *Montana* and *Brendale*. Neither argument is persuasive.

1. *Montana and Brendale* are not distinguishable on the grounds that the General Allotment Act is not at issue in this case.

The State submits, contrary to the view of the circuit court, *Bourland*, 949 F.2d at 991 (Pet. App. A-26-A-27), that it is not important under *Montana* and *Brendale* that those two cases were decided in the context of the General Allotment Act; the logic of the rule relating to the treaty power and to inherent sovereignty apply generally. Even if the General Allotment Act is important to those cases, however, the 1954 Cheyenne River Act fits easily into that context. This is so because the 1954 Cheyenne River Act, like the General Allotment Act, contemplated "the eventual elimination" of tribal government.

The Cheyenne River Act was enacted in 1954. Just one year earlier, Congress had enacted H.R. Con. Res. 108, 67 Stat. B132 (July 27, 1953) which stated that the policy of Congress was "as rapidly as possible" to subject the Indians to the "same privileges and responsibilities as are applicable to other citizens of the United States, [and] to end their status as wards of the United States." See *Washington v. Confederated Bands and Tribes of the Yakima Indian Nation*, 439 U.S. 463, 488 n.32 (1979). According to this Court, this "policy reflected a return to the philosophy of the General Allotment Act of 1887." *Id.*

That the 1954 Cheyenne River Act was itself part and parcel of this effort in the early 1950s through the 1960s²⁴ is

²⁴ Strickland, *Felix S. Cohen's Handbook of Federal Indian Law* (1982 ed.) p. 152 states that movement in the direction of termination had

demonstrated by the legislative history of the Cheyenne River Act. Representative E.Y. Berry of South Dakota, one of the principal sponsors of the Cheyenne River Act, directly tied the Cheyenne River Act to other legislation "which will terminate the Federal supervision over six groups of Indians." 100 Cong. Rec. 13160 (Aug. 3, 1954) (J.A. 220). According to Representative Berry,

This Congress has already passed legislation which will terminate the Federal supervision over six groups of Indians, and I stress the point that in every instance the Indians themselves have either asked for this terminal legislation and have helped to work out the terminal program, or have given their assent to it. . . . The bill before us now is a bill which authorizes settlement for land damages on the Cheyenne Indian Reservation of the Sioux Tribe of South Dakota and authorizes a rehabilitation program for these people, to put them in shape to where in a period of ten to fifteen years they, too, will be ready to throw off the shackles of Federal supervision.

. . . .

The Indians will be moved back up on to the open prairie without protection from the elements. Dams and cisterns will have to provide their water supply. Their way of life will be completely changed. If, however, this settlement program works out as the Indians and the subcommittee have set it up, these people will become established, part of them will be relocated off of the reservation and *all of them will be placed in shape to handle their own affairs without supervision from the Indian Department in a period of possibly 10 or 15 years.*

100 Cong. Rec. 13160 (Aug. 3, 1954) (J.A. 220-226) (PTA PP) (emphasis added).

already begun in the late 1930s but that a "policy of rapid assimilation through termination was not officially adopted by the federal government until 1953." See also *id.* 811-818.

Clearly, the 1954 Congress wanted to improve the condition of tribal members through this Act for the purpose of moving them toward termination just as the 1887 Congress saw the implementation of the General Allotment Act as moving toward termination. Similarly, the Department of Interior, in its letter of March 19, 1954, printed at H.R. Rep. No. 2484, 83d Cong., 2d Sess. 13 (1954) (J.A. 218) (PTA T, 13), describing the facilities to be provided to the Indians stated,

During this period of time [six to eight years] the situation of the Indians may change appreciably, particularly in view of the national policy of terminating special federal services of a public nature to Indians by transfer of responsibility for such services to the States and their local subdivisions.

(Emphasis added.) Indeed, the Tribe itself, in its "Memorial to the 83d Congress" stated that

We are convinced that the time must come when the American Indian will cease to be the ward of the United States. . . . [T]he Sioux Tribe of the Cheyenne River Reservation should be placed in a position to take over their own affairs and ultimately released as wards of the United States.

(J.A. 189-190) (PTA Z, 35) (emphasis added).

Finally, it is not relevant that the termination policy of the fifties and sixties has now been reversed. In *Montana v. United States*, 450 U.S. at 559 n.9, the Court found that the policy of allotment and the sale of surplus reservation lands under the General Allotment Act had been repudiated by the Indian Reorganization Act of 1934. This Court nonetheless said "what is relevant in this case is the effect of the land alienation occasioned by that policy on Indian treaty rights tied to Indian use and occupation of reservation land." *Id.* (emphasis added). The same is true here. In sum, insofar as it is necessary that a particular act manifest Congress' intent eventually to eliminate tribal government, the 1954 Cheyenne River Act reflects such intent.

2. *Montana* and *Brendale* are not distinguishable on the grounds that certain interests have been reserved to the Tribe.

The tribal officials have appeared to contend that because the Tribe retained certain interests in the land to which the United States took title, that the result should be different. See Brief of Respondents in Opposition to Petition for Writ of Certiorari, p. 14.

This argument is without merit. The rights under Sections VII and IX to remove salvage and timber and to occupy the taken area *expired* by the terms of the statute prior to the closing of the reservoir almost three decades ago. See Section IX. (J.A. 242-243). The right to extract minerals "subject to all reasonable regulations . . . for the protection and use by the United States of the taking area" (J.A. 240) does not constitute "exclusive use and benefit" of the Tribe of the area, and so no treaty right to regulate may be asserted on this basis.²⁵

Members of the Tribe do have a right to graze stock on the taken area under Section X (Pet. App. A-205), but this right is again not one of exclusive use. Both the United States and the public may use that land pursuant to Sections II and X of the Act. Furthermore, a tribal right to *graze* on the *lands* surrounding the reservoir is entirely irrelevant to whether the Tribe may exercise civil regulatory jurisdiction over non-Indians on the *waters* of the Oahe Reservoir.

Members of the Tribe also have under Section X a right of "free access" for hunting and fishing purposes, but this right does not constitute a right of exclusive use; rather, it is a right to be exercised in common with the "other citizens of

²⁵ No mineral rights were "reserved" to the Tribe on lands acquired from non-Indians. (Tribal ownership of the bed of the Missouri at the time of the Act is not a closed issue; thus, it is not known if the Tribe has a mineral right below the surface of the bed as it existed in 1954.)

the United States." Thus, no treaty right to regulate may be argued to flow from the retained interests of the Tribe.

Nor may a tribal right to civil regulatory jurisdiction over non-Indians be argued to exist on the basis of the inherent sovereignty of the Tribe on the taken area. The relationship between the Tribe and non-Indians is one implicating the Tribe's external relations, and that authority has been divested. See *Brendale*, 492 U.S. at 425-426, (quoting *United States v. Wheeler*, 435 U.S. at 336) (White, J.).²⁶

II

THE HOLDING OF *UNITED STATES V. DION* HAS NO APPLICATION TO THE ISSUE OF WHETHER A TRIBE MAY EXERCISE CIVIL REGULATORY JURISDICTION OVER NON-INDIANS. MOREOVER, EVEN IF *DION* DOES APPLY, THE TEXT AND LEGISLATIVE HISTORY OF THE 1954 CHEYENNE RIVER ACT INDICATE THAT THE TRIBE HAS BEEN DIVESTED OF WHATEVER CIVIL REGULATORY JURISDICTION IT MAY PREVIOUSLY HAVE HAD OVER NON-INDIANS IN THE TAKEN AREA.

A. The *Dion* Standard does not Apply to this Case.

Rather than apply the *Montana-Brendale* rule to the question of whether the tribe had civil regulatory jurisdiction over non-Indians on lands acquired from Indians, the Eighth Circuit Court of Appeals applied a rule it derived from *United States v. Dion*, 476 U.S. 734 (1986).

In determining whether the Eagle Protection Act applied to an Indian taking an eagle on tribal land, the *Dion* court

²⁶ Allowing a tribe to avoid *Montana-Brendale* on the basis that it retains a property interest but not "exclusive use and benefit" of the property would raise the threat of tribal civil regulatory jurisdiction over non-Indians on any local, state or federal road on a reservation in which the entire interest had not been obtained. Since states and counties regularly build roads across reservation lands, including trust lands, the potential disruption is very great indeed. See 25 U.S.C. §§ 323-327; 25 U.S.C. § 357; South Dakota Official Highway Map (1987).

demanded "clear evidence" of congressional consideration of the conflict between the treaty right in question and the intended action and resolution of the "conflict by abrogating the treaty." 476 U.S. at 739-740.

Neither *Montana* nor *Brendale*, however, applied such a stringent standard when determining whether the Tribe has civil regulatory jurisdiction over non-Indians. In *Montana*, there was no showing that Congress had "actually considered" the conflict between the alleged right under treaty to regulate non-Indian hunting and fishing and the allotment policy of the General Allotment Act. In *Brendale*, there was no showing that Congress "actually considered" the conflict between the alleged tribal right to zone land on the reservation and the allotment policy.

In *Montana* and *Brendale*, the focus was on the effect of congressional action on the authority of a tribe over non-Indians. In *Dion*, in contrast, the focus was on whether Congress had *actually considered* and accomplished the abrogation of a treaty right exercisable by a tribal member or tribe.

This Court has thus applied one standard in *Montana* and *Brendale* for determining when a tribe's governmental authority over nonmembers may be divested and another more stringent standard in *Dion* for determining when a tribe's right to undertake a particular nongovernmental activity may be divested. The *Montana-Brendale* approach speaks to the stark necessity of grounding tribal political regulatory authority over non-Indians on a firm historical and legal foundation. The *Dion* approach speaks to the traditional solicitude of the United States for the Indians when it provides special protections to nongovernmental activities of Indians.

Adoption of a *Dion* based rationale to questions of tribal civil regulatory jurisdiction over non-Indians would accordingly negate *Montana* and *Brendale*.²⁷

²⁷ It is notable that *Dion* itself did not cite *Montana* although *Montana* had been decided five years earlier. None of the three opinions in *Brendale* cited or mentioned *Dion* although *Dion* had been decided three years at the time *Brendale* was handed down.

Dion and the logic of *Dion* do not apply to assertions by a tribe that it retains a specific governmental power over non-Indians, and the Court of Appeals erred in applying *Dion* to the issue in this case.

B. Even if *Dion* Applies Here, the Cheyenne River Act Abrogated any Tribal Right to Regulate Non-Indians in the Taken Area.

Even assuming the applicability of *Dion*, however, the Court of Appeals misapplied the rationale of the case in failing to find that the 1954 Cheyenne River Act abrogated whatever rights the tribe had to regulate non-Indians on the taken area.

In *Dion*, this Court considered whether the Eagle Protection Act abrogated the right of a tribal member to exercise his treaty guaranteed right to harvest eagles. The Court stated that it was essential that there be

clear evidence that Congress actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other, and chose to resolve that conflict by abrogating the treaty.

Dion, 476 U.S. at 740.

The Court focused on the text of the statute but also considered its legislative history and administrative interpretation in holding that the Eagle Protection Act abrogated the treaty rights of Indians at issue in *Dion*.

1. The text of the Cheyenne River Act clearly abrogates any tribal right to regulate non-Indians in the taken area.

The text of the Eagle Protection Act and of the 1954 Cheyenne River Taking Act are conceptually indistinguishable. The Eagle Protection Act at issue in *Dion*

renders it a federal crime to "take, possess, sell, purchase, barter . . . any bald eagle . . . or any golden eagle."

476 U.S. at 740. The Act, however, authorizes

the Secretary of the Interior to permit the taking, possession and transportation of eagles "for the religious purposes of Indian tribes," and for certain other narrow purposes, upon a determination that such taking, possession, or transportation is compatible with the preservation of the bald eagle or the golden eagle.

476 U.S. at 740. This Court found that the provision allowing the taking of eagles under secretarial permit for religious purposes of Indian tribes

is difficult to explain except as a reflection of an understanding that the statute otherwise bans the taking of eagles by Indians. . . .

Dion, 476 U.S. at 740.

The Court reasoned that the provision requiring secretarial permission to hunt eagles for religious purposes precluded a claim that Congress had not understood that it was outlawing the taking of eagles by Indians *without* secretarial permission. In other words, the Court refused to find that the Indians retained any right other than that set out in statute.

The Cheyenne River Act has an analogous text and structure. The Cheyenne River Taking Act provides for the acquisition from the Tribe and its members of

all tribal, allotted, assigned, and inherited lands or interests within said Cheyenne River Reservation belonging to the Indians of said reservation, which lands are required by the United States for the reservoir to be created by the construction of the dam across the Missouri River in South Dakota, now known as Oahe Dam, including such lands along the margin of such proposed reservoir as may be required by the Chief of Engineers, United States Army, for the construction, protection, development, and use of said reservoir all as described in Part II of this agreement, subject, however, to the conditions of this agreement. . . .

Pub. L. No. 776, § 1 (emphasis added) (J.A. 235).

The Cheyenne River Act also identifies certain specific rights which the Tribe retained and other rights which could be exercised by tribal members after the taking. Critically, the 1954 Cheyenne River Act states

The said Tribal Council and the members of said Indian tribe shall have, without cost, the right of free access to the shoreline of the reservoir including the right to hunt and fish in and on the aforesaid shoreline and reservoir, *subject, however, to regulations governing the corresponding use by other citizens of the United States.*

Pub. L. No. 776, § 10 (emphasis added) (J.A. 244). Here the taking of rights is sweeping, as in the Eagle Protection Act. The remaining tribal right could be no greater than that specifically set out in the Act itself, pursuant to *Dion*, and Congress had set out the boundaries of that right, i.e., the tribe had only the right of "access" to hunt and fish but certainly not the right to "regulate" others.²⁸

²⁸ Two cases which analyze language similar to Section X are *New York ex rel. Kennedy v. Becker*, 241 U.S. 556 (1916) and *Puyallup Tribe v. Washington Game Dept.*, 433 U.S. 165 (1977). In *Becker*, the Court considered the effect of a grant of land by a tribe containing the following provision: "Also, excepting and reserving to them . . . the privilege of fishing and hunting on the . . . land hereby intended to be conveyed." *Becker*, 241 U.S. at 562. The right reserved was assumed to be an "easement" only to nonexclusive use of the area for hunting and fishing; such a right did not, in the view of the Court, insulate an Indian on the off-reservation land from state jurisdiction. *Becker*, 241 U.S. at 563-564. In other words, the words did not reserve governmental power. Similarly, in *Puyallup*, the Court noted a treaty provision which stated that "[t]he right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians in common with all citizens of the Territory." *Puyallup*, 433 U.S. at 176 n.16. According to the Court, this right reserved, as to treaty fishermen "a previously exclusive right." *Id.* (emphasis added). The Court stated that the language "recognizes that the right is to be shared 'in common with the non-Indian citizens of the territory.'" The property in question had been conveyed to non-Indians and the Court essentially readopted an earlier holding that the tribal right to fish was subject to "reasonable regulation by the state." 433 U.S. at 175.

2. The clear language of abrogation in the text of the Act is supported by the Act's legislative history.

As in *Dion*, "the legislative history of the statute supports" the view that the tribal right in question has been divested. 476 U.S. at 740. Two statutes are especially pertinent to this analysis.

a. 1950 statute.

Legislation was introduced in 1949 to allow negotiation of contracts with the Cheyenne River and Standing Rock Sioux Tribes in relation to construction of the Oahe Reservoir. The proposed act stated in part that any contract shall provide for the preservation of any treaty rights of the tribe in regard to fishing, hunting and trapping, insofar as may be practicable under the physical conditions existing when the Oahe project is completed. . . .

H.R. 5372, 81st Cong., 1st Sess., 4 (July 13, 1949) (PTA J, 4); see also S. 1488, 81st Cong., 1st Sess. (Apr. 12, 1949) (J.A. 182-184) (PTA K).

After hearing, Senator McFarland, the committee chairman, submitted S. Rep. No. 1737, 81st Cong., 2d Sess. (1950) (PTA N) which called for *deletion* of the house bill and proposed submission of a new bill. The new bill contained no provisions requiring protection of treaty rights, even "insofar as possible." The Senate agreed to strike the House bill and substitute the Senate Committee proposal. See 96 Cong. Rec. 14696-14697 (Sept. 13, 1950) (PTA P). Congress ultimately adopted the Senate bill - that is, the bill which did not provide for protection of treaty hunting and fishing rights, but

Thus, in neither circumstance involving language similar to Section X was the tribe held to have jurisdiction over non-Indians; in fact, in both the state was able to regulate the Indian hunters and fishers. While neither case is precisely on point, both point the way to a decision in this litigation.

instead provided for "just compensation" for all "interests" taken. Pub. L. No. 870, 64 Stat. 1093 (1950).—(Pet. App. A-189). Representative Case explicitly drew attention of Congress to the treaty question:

Hunting and fishing rights also were a part of the rights recognized by treaty in 1851 and 1868 and ratified by the Congress. To the extent that these may be impaired or destroyed, the tribe is entitled to compensation apart from settlement with the allottees holding individual tracts of land.

96 Cong. Rec. 15609 (Sept. 22, 1950). (J.A. 187) (PTA Q).

Thus, the Congress in the 1950 legislation recognized that hunting and fishing treaty rights would be "impaired or destroyed" by the legislation which would come afterwards, and determined to pay for that "impairment or destruction."

b. 1954 Cheyenne River Act.

The legislative history of the 1954 Cheyenne River Act also demonstrates that Congress intended to divest the Tribe of whatever civil regulatory jurisdiction it might have for hunting and fishing purposes over non-Indians. . . . that the Tribe, through acceptance of Public Law 776, agreed to such divestment.

(1) Offer of payment for wildlife resources and grazing loss.

Congress offered payment for and the tribal members accepted payment for "all tribal, allotted, assigned and inherited lands or interests . . . as may be required . . . for the construction, protection, development and use" of the reservoir. See Pub. L. No. 776, 68 Stat. 1191 (1954). (J.A. 235). It also agreed to pay "for the bed of the Missouri River so far as it is the eastern boundary of said Cheyenne River Reservation." (J.A. 236). The Tribe, in addition, sought, the Congress offered and the Tribe accepted compensation for the permanent loss of wildlife in the area. This fact reinforces the view

that the Act and Section X in particular should not be read to allow tribal jurisdiction over non-Indians on that same area.²⁹

Lloyd LeBeau of the Cheyenne River Sioux Tribe, testifying before the congressional committee, explained the tribal demand with relation to wildlife resources on the taken area:

The value of this loss of wildlife resources was placed at \$74,300 annually. *Because of the fact that we are losing these resources forever, we have capitalized that sum at four percent to arrive at our value.*

May 20, 1954, Hearings, *supra* at 265-266 (PTA RR, 265-266) (J.A. 207) (emphasis added).³⁰

²⁹ Congress had been told by the Department of the Interior in 1950 that "over 400 deer" were estimated to live in the timbered area which would be inundated; it was further told that in the "bottoms area, pheasants, rabbits, and raccoons are numerous." H.R. Rep. No. 1047, 81st Cong., 1st Sess., 4 (1949). (J.A. 185). Other losses were also identified, but fishing was found "not important on either reservation at the present time." H.R. Rep. 1047, *supra* at 4; (J.A. 186). The Tribe stressed that the loss of the wildlife resource was complete. May 20, 1954 Hearings, *supra* at 266-268. (J.A. 208-210). Compensation was demanded based on the value of the wildlife to the Tribe. The Missouri River Basin Investigation Report estimated the annual amount of loss to be either at \$36,600 or \$74,300; the lower amount reflected the "increase in store bills which will result from the loss of game for food." Missouri River Basin Investigation Report No. 138 at 78 (Apr. 1954). (J.A. 193). The higher amount of \$74,300 was based on the "sportsmen's expenditures [which] reflect the amount sportsmen are willing to spend to bag various species of game." Report No. 138, *supra* at 77-78 (PTA BB, 77-78). The Tribe based its demand on the higher amount. May 20, 1954 Hearings, *supra* at 265-266 (J.A. 207).

³⁰ Capitalization of the \$74,300 figure at four percent yielded the ultimate claim of over \$1,857,500 in permanent wildlife and wild product loss to the Tribe, May 20, 1954, Hearings, *supra* at 266 (PTA RR, 266) (J.A. 208), and this claim was submitted by the Tribe to Congress. See H.R. 2484, 83d Cong., 2d Sess., 5 (1954) (PTA T) (J.A. 215). After lengthy hearings, the tribal negotiating committee "scaled downward and resubmitted" its demand for loss of "wildlife, wild fruit, etc." to \$1,056,750 (J.A. 216).

The Tribe also sought, was offered and ultimately accepted damages for the loss of grazing on the taken area in two categories. The individual Indian's right to graze land was subsumed in the value of the land itself, and therefore, the grazing damages to individuals were part of a \$1,940,223.83 demand for "land, tribal, allotted, assigned, Indian fee patent, and irrigation potential." See H.R. Rep. No. 2484, 83d Cong., 2d Sess. (1954) (J.A. 216) (PTA T, 5).

More importantly, the Tribe demanded compensation in the category of tangible future damages, under the heading "[g]razing permit revenue loss."³¹ See H.R. Rep. 2484, *supra* at 5 (PTA T, 5) (J.A. 215). Senator Watkins, in presenting the bill to the Senate, drew attention to the need for severance damages with regard to grazing lands. 100 Cong. Rec. 14979 (Aug. 18, 1954). (J.A. 231) (PTA F).

The amounts ultimately offered by Congress for the loss of wildlife resources, grazing loss and other indirect damages were combined with the direct damage offer, and the Act as passed offered \$5,384,000.14.³² (J.A. 236).

³¹ This demand was based on the allegation of the unwillingness of livestock companies to pay the former grazing fees due to insufficient river frontage and lack of access to protection and winter feed presently afforded in river bottoms. Chairman Frank Ducheneaux of the Cheyenne River Sioux Tribe explained the matter in depth to the congressional committee. See generally May 19, 1954, Hearings, *supra* at 193-204, 209 (PTA U, 193-204, 209).

³² The bill as introduced provided separately for the taking of the property and the severance damages. See H.R. 2233 at § 2 printed at 100 Cong. Rec. 13152 (Aug. 3, 1954). Category 1 (principally the land itself) and Category 2 damages (including the wildlife and grazing loss damages), were ultimately combined into a single category and reduced from a total of \$6,587,854.95 to \$5,384,000.14. See *Hearing before the Committee on Interior and Insular Affairs on H.R. 2233* (Aug. 17, 1954) pp. 3-4. (J.A. 229-230) (PTA EE, pp. 3-4). The Act also provided an additional \$5,160,000 for the "complete rehabilitation for all members of said Tribe. . . ." (J.A. 238-240).

(2) **Acceptance by three-quarters of tribal members of the terms of Public Law 776.**

As noted, the provisions of Public Law 776 were not effective until accepted by three-quarters of the adult population of the Tribe. (J.A. 235-236). Members of the Tribe voted overwhelmingly to accept the offer contained in the provisions of Public Law 776. The ballot submitted to tribal members states in part:

The major provisions of Public Law 776 as follows . . .

1. The United States will pay to the Indian owners \$2,250,000 for the Indian lands taken for the Oahe project. . . .

2. The United States will pay \$3,134,014 for indirect damages caused by taking the Indian lands for the Oahe project. . . .

3. The United States will provide \$5,160,000 for rehabilitating members of the tribe who were residents of the reservation on September 3, 1954. . . .

. . . .

6. *Indians may graze livestock on the part of the land not flooded and may hunt and fish in the taking area without charge.*

(J.A. 262-264) (PTA HH, 1) (emphasis added).

Ninety-two percent of those tribal members who voted cast a ballot in favor of the acceptance of Public Law 776. (J.A. 266) (PRB B). Of the total membership of the Tribe eligible to vote, 75.35 percent voted in favor. *Id.* The acceptance of the terms of Public Law 776 by the Tribe signals a recognition by the Tribe and its members that all of their legitimate demands were accounted for, including their demands with relation to wildlife and grazing. Furthermore, the acceptance of Section X of Public Law 776 and the explanation of that section in the ballot, preclude the Tribe's present claim that the Tribe has more rights than those identified in Section X and the ballot.

3. **The administrative interpretation of the Taking Acts supports State jurisdiction over non-Indians on the lands at issue.**

The consistent administrative interpretation of "taken area" legislation by the agency with the primary responsibility, the Army Corps of Engineers, has been that the State has jurisdiction over non-Indians on the Missouri River "taken areas," including the lands and waters. For example, on September 15, 1986, Colonel West of the Corps of Engineers wrote to the South Dakota Game, Fish and Parks Secretary that:

The position of the Omaha District, as well as the State of South Dakota, has always been that regulation of hunting and fishing on Corps project lands in South Dakota is a matter of state law. This was clearly the intent of Section 4 of the 1944 Flood Control Act, 16 U.S.C. § 460(d). As you know, the Corps has only proprietorial jurisdiction over its project lands along the mainstem of the Missouri River in South Dakota. Such lands remain subject to state civil and criminal jurisdiction.

(PTA LL, 1) (J.A. 288).³³

³³ Other correspondence is also pertinent: A letter of March 9, 1976, from Colonel Glenn of the Corps of Engineers to Michael Jandreau, chairman of the Lower Brule Sioux Tribe, stated the opinion of the Corps with regard to the take areas adjoining the Lower Brule Reservation. According to Colonel Glenn, "the Fish and Game laws of the State of South Dakota are the only such laws that apply to these areas which were formerly owned by the Lower Brule Sioux Tribe and its members." Letter of Mar. 9, 1976 (PTA JJ, 5, J.A. 268). A similar letter was sent at the same time to the chairperson of the Crow Creek Sioux Tribe. (PTA KK).

Similarly, in 1988, the Office of Counsel of the Department of Army took notice of the "relatively recent" jurisdictional dispute and stated in a letter to the Crow Creek Sioux Tribe:

While I take no position as to whether the Tribe or State ultimately should have jurisdiction in this matter, until the question is finally resolved, I must be guided by the existing

On November 19, 1987, the subject came before the Senate Select Committee on Indian Affairs. The Corps of Engineers informed the Select Committee that the State, not the Tribe, had jurisdiction on the Corps taken area for hunting and fishing purposes. According to the Chief of the Planning Division of the Missouri River Division, Mr. John Velehradsky:

Senator, it is my understanding that, in this instance, we would rely on the State agencies for jurisdiction over the enforcement of laws on those areas. The United States or the Corps of Engineers has no jurisdiction in terms of enforcement within the project. We rely on the State agencies. . . . We have jurisdiction over the land, but in terms of enforcing State game laws, we do not have any jurisdiction over State game laws.

S. Hrg. No. 100-500, 100th Cong., 1st Sess. (Nov. 19, 1987) p. 12 (J.A. 297) (PTA MM, 12). This discussion concerned two other reservations which are adjacent to the Missouri River main stem, but the statement clearly has application to the Cheyenne River taken area, in the State's view.

Finally, it is significant that the pronouncements of the Corps to the public also recognize state jurisdiction and not tribal jurisdiction on the taken area. In United States Army Corps of Engineers, Omaha District, Lake Oahe, *Oahe Dam Boating and Recreation Manual* (March 1984) (sheet 1 of 30), an atlas distributed to the public by the Corps of Engineers, it is said

Hunting and fishing is allowed on Lake Oahe and project land, unless posted otherwise, in accordance with the rules and regulations established by the North Dakota Game and Fish Department, the South Dakota Game, Fish and Parks Department

legal record and court decisions. These indicate to me that it was the intent of Congress that jurisdiction over these former Indian lands is in the State of South Dakota.

(J.A. 301, PTA NN, 2).

and the U.S. Fish and Wildlife Service. These regulations may change annually so hunters and fishermen are advised to review current regulations before engaging in these forms of recreation.

(PH Ex. 33) (J.A. 284) (emphasis added).

In sum, the text, legislative history and administrative interpretation of the Cheyenne River Act of 1954 indicate an "unmistakable" policy choice by Congress to divest the Tribe of whatever civil regulatory jurisdiction it might have had over non-Indians hunting and fishing on the taken area. This meets the *Dion* test.

III

THE BRIGHT-LINE RULE OF MONTANA-BRENDALE APPLIES TO NON-INDIANS HUNTING AND FISHING ON TAKEN AREA PROPERTY ACQUIRED IN FEE FROM NON-INDIANS.

Approximately 18,000 acres were acquired for construction and operation of the Oahe Reservoir from non-Indians within the reservation under the general authority of the 1944 Flood Control Act. H.R. Rep. No. 1047, *supra* at 3. (J.A. 185) (PTA O, 4).

The District Court did not distinguish between lands acquired from non-Indians and lands acquired from the Tribe and its members. The District Court held, in consequence, that the Tribe lacked civil regulatory jurisdiction over non-Indians on all of the taken area. The decision of the District Court was correct. In *Montana* and *Brendale*, as set forth above, this Court has established the principle that a tribe lacks even an "arguable" claim to jurisdiction over non-Indians by virtue of the treaty power unless it holds "absolute and undisturbed use" of the lands in question. In the case of lands acquired from non-Indians, such lands were not, *before* the acquisition by the United States, held in "absolute and undisturbed use" by the tribe nor were they *afterwards* held by the tribe in such status.

Montana and *Brendale* also establish that the Tribe has been divested of its inherent sovereignty over its external relations or, in other words, over the relationship between the Tribe with nonmembers or non-Indians. Certainly that principle applies fully and forcefully with regard to a non-Indian on lands which were non-Indian before the Oahe acquisition, which remained non-Indian after that acquisition, and which were open to the public under Section X of the act in question. Thus, the decision of the District Court is correct.

The Court of Appeals, however, failed to apply the bright-line rule of *Montana-Brendale* here. As noted, the Court of Appeals distinguished between lands acquired from Indians and lands acquired from non-Indians – a distinction without basis in this Court's rulings or in the facts of this case.

As to lands acquired from non-Indians, the Court of Appeals remanded to the District Court to apply a *Montana* analysis in light of its reversal. The appellate court observed in a footnote, however, that if the land had originally been acquired by non-Indians other than through "an allotment act," the analysis "may be" that *Montana* did not apply to the case. *Bourland*, 949 F.2d at 995 n.19 (Pet. App. A-45 n.19).

The approach of the Court of Appeals is wrong and unworkable. Apparently, in the view of the Eighth Circuit, the Tribe is divested of civil regulatory jurisdiction over non-Indians on lands acquired from non-Indians only if this statute under which the original acquisition occurred is an allotment act or other act accompanied by the "intent to destroy tribal government." *Bourland*, 949 F.2d at 991 (Pet. App. A-27). For this reason, the District Court on remand is essentially instructed to determine, with regard to *each parcel*, how the parcel was acquired and whether, if no allotment act was involved, the statute at issue was the equivalent of an allotment act.

In remanding for the District Court to reapply *Montana*, the Eighth Circuit seemed confused as to this Court's opinions in *Brendale*. The Court of Appeals reasoned that:

Because the 18,000 acres within the taken area are in an "open area", the analysis used by Justice White in his plurality opinion in *Brendale* should be applied to this acreage. According to Justice White's opinion, the 18,000 acres should be analyzed under the *Montana* standard. *Brendale*, 492 U.S. at 421-433, 109 S.Ct. at 3003-3009. The District Court performed such an analysis of the taken area in whole, and found that neither of the exceptions to the general rule laid out in *Montana* applied.

Bourland, 949 F.2d at 995 (Pet. App. A-45-A-46). The Court of Appeals thereby misapplied both *Montana* and *Brendale*. Justice White's plurality opinion in *Brendale* does not rely on the "open-closed" distinction utilized in Justice Stevens' concurring opinion. See 492 U.S. at 423-425 and n.8. Second, the *Brendale* plurality finds that if the second of the two *Montana* exceptions applies, i.e., relating to the impact of nonmember activity on the political integrity, economic security or health and welfare of the Tribe, this factor would give rise to federal or state, not tribal court, jurisdiction. 492 U.S. at 431.

The Eighth Circuit's misreading argues, we respectfully suggest, for adoption of the bright-line rule of the *Montana* case and the *Brendale* plurality as set forth above. Because the Tribe does not maintain "exclusive use and benefit" of lands acquired by the United States from non-Indians on the taken area (regardless of how those lands were originally by the non-Indians acquired), it has no claim derived from a treaty power to regulate non-Indians on such lands. Further, because the dispute in question is one involving the external relations of the Tribe and the Tribe has been divested of its inherent sovereignty over its external relations, it follows that the Tribe has no civil regulatory power over non-Indians on the taken area.

CONCLUSION

For the reasons set forth above, the State respectfully requests that this Court reverse the decision of the Circuit Court which reversed the order of the District Court permanently enjoining the Defendants from enforcing tribal hunting and fishing regulations on the portion of the taken area acquired pursuant to the Cheyenne River Act, *see Bourland*, 949 F.2d at 996 (Pet. App. 51); the State further respectfully requests that this Court reverse the decision of the Circuit Court remanding the case for proceedings consistent with its opinion with regard to the portion of the taken area comprising land other than that conveyed to the United States pursuant to the Cheyenne River Act, *see id.*; the State finally respectfully requests that this Court hold that the Tribe has no civil regulatory jurisdiction over non-Indians on the entire taken area at issue and remand for reinstatement of the order of the District Court permanently enjoining the tribal Defendants from regulating the hunting and fishing activities of non-Indians in the entire taken area.

Respectfully submitted,

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IN SENATE
January 1982

OFFICE OF THE CLERK

STATE OF SOUTH DAKOTA

Petitioner,

ORRIN SCHULMANN, ET AL.

Respondents.

IN SENATE AND HOUSE OF REPRESENTATIVES OF THE UNITED STATES
COMMISSION ON FEDERAL COURTS AND JUDICIAL ADMINISTRATION

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STATEMENT OF THE CASE

A. Historical Background of Sioux Hunting and Fishing.

The Sioux people have always relied on nature's bounty for their sustenance, through hunting, fishing and gathering. See R. Meyer, *HISTORY OF THE SANTEE SIOUX* 6-7 (1980). Although the Teton Sioux are best known as buffalo hunters, "small game, birds, and fish" were also important elements of their diet, and they had a number of diverse fishing methods, including pole fishing, spearing, and seining. R. Hassrick, *THE SIOUX, LIFE AND CUSTOMS OF A WARRIOR SOCIETY* 168, 172-73 (1964). The use of the alluvial, woodland and riparian resources of the plains, as much as the exploitation of buffalo, made possible their permanent existence as a hunting people on the plains. *Id.* at 164. The District Court found that "[h]unting and fishing . . . by members of the Cheyenne River Sioux Tribe [are] an important cultural, social and religious activity." (JA 67).¹ See S. Pond, *THE DAKOTA OR SIOUX IN MINNESOTA AS THEY WERE IN 1834* 99-101 (1986) (describing the religious "Feast of Raw Fish").

B. Treaties with the Sioux Nation and Early Statutes.

The Missouri River and its tributary rivers historically were important for the Teton Sioux. Lewis and Clark, the first United States officials to visit the area, encountered Teton Sioux along the Missouri between the Cheyenne and the Moreau Rivers, on what is known today as the "taken area" on the Cheyenne River Reservation. B. DeVoto, *THE JOURNALS OF LEWIS AND CLARK* 47 (1953). The Sioux jealously guarded their territory to protect the hunting, fishing, and gathering which sustained Sioux society and defined Sioux culture. In 1851, when the United States and the Sioux Nation entered into a treaty with several neighboring Indian tribes that set out the boundaries of the tribes' territory and pledged peace, the Sioux reserved "the privilege of hunting, fishing, or passing over" any of the lands described. Treaty of Fort Laramie with the Sioux, 1851, 11 Stat. 549.

In 1866-67, Chief Red Cloud successfully led the Sioux Nation in the Powder River War to protect Sioux hunting grounds from

¹ Citations to the appendix filed with the petition for writ of certiorari will be styled "A__." Citations to the Joint Appendix will be styled "JA__." References to the Petitioner's Brief will be styled "Pet.Br. __." "P.H.Tr." refers to the transcript of the preliminary hearing.

incursion by the Army and settlers along the Bozeman trail.² The United States concluded the Fort Laramie Treaty of April 29, 1868, 15 Stat. 635, "at the culmination of the Powder River War." *United States v. Sioux Nation*, 448 U.S. 371, 374 (1980).³

The Great Sioux Reservation was established by the Fort Laramie Treaty of 1868. "The eastern boundary of the Great Sioux Reservation . . . was the low water mark on the east bank of the Missouri River," *Sioux Tribe v. United States*, 316 U.S. 317, 319 (1942), and the reservation included most of western South Dakota. The reservation was to be held for the "absolute and undisturbed use and occupancy" of the Sioux. Fort Laramie Treaty, Art. 1. The Treaty reserved prior Sioux treaty rights, except provisions regarding the payment of annuities. *Id.*, Art. 17.

An Agreement in 1876, enacted into law by the Act of Feb. 28, 1877, 19 Stat. 254 (1877 Act), gained the consent of the Sioux to the construction of roads across the reservation and the "free navigation of the Missouri River," but did not disturb Sioux civil authority, because the Act otherwise preserved prior treaty rights not inconsistent with its provisions. 1877 Act, Art. 8. Indeed, Congress affirmatively pledged to secure the right of self-government to the Sioux. *Id.*

In the 1880s, pressures developed to break up the Great Sioux Reservation to provide land for settlers. The 1889 Agreement, ratified as the Act of March 2, 1889, 25 Stat. 888, took nine million acres of the Great Sioux Reservation as "surplus land," and established the Pine Ridge, Rosebud, Standing Rock, Cheyenne River, Lower Brule and Crow Creek Sioux Reservations on

² While this war raged, a Joint Special Committee of Congress inquired into the condition of the Indian tribes. The Committee found tribes "in a bad way . . . because of the loss of land and the growing scarcity of game. . . ." R. Utley, *THE INDIAN FRONTIER OF THE AMERICAN WEST 1846-1890* 106 (1984)(emphasis added).

³ As this Court noted in *Sioux Nation*:

The Fort Laramie Treaty was considered by some commentators to have been a complete victory for Red Cloud and the Sioux. In 1904 it was described as "the only instance in the history of the United States where the government has gone to war and afterwards negotiated a peace conceding everything demanded by the enemy and exacting nothing in return."

448 U.S. at 376 n. 4. See F. Prucha, *THE GREAT FATHER* 493 (1986).

remaining tribal lands. The Cheyenne River Reservation is bounded by "the center of the main channel of the Missouri River" on the east. The 1889 Agreement expressly preserved any rights under the Fort Laramie Treaty of 1868 that were "not in conflict" with the Act. 1889 Act, § 19.

The 1889 Act also provided for allotment of tribal land to individual Indians under twenty-five year trust patents to promote farming. *Id.*, §§ 8-11, 17. Most tribal land, however, was not suitable for farming: "Year after year the would-be farmers watched the corn and other crops burn up and blow away, or vanish under great clouds of grasshoppers, or disintegrate under pulverizing hail." Utley, *supra*, at 240. On their reservations, the Sioux continued the traditions of hunting, fishing, and gathering. Red Cloud told the Indian agent at Pine Ridge, "the Great Spirit did not make us to work [the fields]. He made us to hunt and fish." *Id.* at 239-40.

In 1908, "Congress authorized the Secretary of the Interior to open 1.6 million acres of the Cheyenne River Sioux Reservation for homesteading." *Solem v. Bartlett*, 465 U.S. 463, 464 (1984); Act of May 29, 1908, ch. 218, 35 Stat. 460 *et seq.* ("1908 Act"). Congress did not, however, alter the reservation boundaries established by the 1889 Agreement. *Solem*, 465 U.S. at 474-81.⁴ Congress kept nearly all of the land along the Cheyenne and the Missouri Rivers closed to non-Indian settlement.⁵ Thus, the District Court found that two-thirds of the Tribe's trust lands "border the Missouri and Cheyenne Rivers on the eastern and southern boundaries of the reservation." (JA 65). The 1908 Act provides that the benefits of any existing treaties "not inconsistent with the provisions" thereof were not disturbed. 1908 Act, § 9.

⁴ "[T]he opening of the Cheyenne River Sioux Reservation was a failure." *Solem*, 465 U.S. at 480. "Few homesteaders perfected claims on the lands . . . due to the fact that the opened area was much less fertile than the lands in southern South Dakota opened by other surplus land acts." *Id.* Lands not sold to settlers were later returned in trust to the Tribe. See 25 U.S.C. § 463.

⁵ Subsequently, Congress enacted legislation aimed at consolidating tribal ownership of land along the Missouri and Cheyenne Rivers. Pub.L. No. 418, 78 Stat. 389 (1964).

C. The Indian Reorganization Act of 1934 and Tribal Management of Reservation Wildlife Resources.

The Indian Reorganization Act (IRA), 48 Stat. 984 *et seq.*, 25 U.S.C. § 461 *et seq.*, was "specifically intended to encourage Indian tribes to revitalize their self-government." *Fisher v. District Court*, 424 U.S. 382, 387 (1976). The Cheyenne River Sioux Tribe did so by adopting a tribal Constitution and By-Laws under the aegis of the IRA in 1935. 25 U.S.C. § 476 (JA 269). The Constitution and By-Laws, drafted with the assistance of the Bureau of Indian Affairs and approved by the Secretary of the Interior, vested the Tribe's pre-existing authority to license hunting and fishing on the reservation. Article VII, § 2 of the By-Laws authorizes the Tribal Council to pass ordinances for the control of hunting and fishing upon the reservation, not conflicting with any federal or state game laws; to cooperate with federal and state conservation efforts; and to issue licenses for hunting and fishing. (JA 281). In the early days of reservation life, deer and antelope herds were numerous, but by 1910, big game "had practically disappeared from the area." Trial Exh. 94 at 2. Therefore, wildlife conservation was a primary concern of the reorganized Tribal Council. The District Court found that, with the passage of the IRA, "the Tribe enacted ordinances, promulgated under the authority of Article VII of the Tribal By-Laws and approved by the Bureau of Indian Affairs (BIA), which required nonmembers to obtain a tribal permit to hunt or fish on the reservation." (JA 65-66). See Tribal Ordinances Nos. 2, 3, 4; (JA 152).

Tribal Ordinance No. 2, enacted in 1937, made it "unlawful for any non-member of the Cheyenne River Sioux Tribe . . . to fish or hunt within the Reservation . . . without first having procured a Reservation permit to do so." Ordinance No. 2 also provided substantive fishing regulations, a strict licensing system for beaver trapping, and closed seasons on big game hunting, including deer and antelope.

In 1943, the BIA report on the Cheyenne River Sioux Reservation stated that "[w]ildlife, although not of primary importance in the economy of the Indians on the Cheyenne River Reservation, does furnish a considerable quantity of food and cash income for many families. . . . *Both Indians and Whites do considerable fishing for sport.* . . . Big game is not very plentiful on the reservation area

and no open season is allowed for either whites or Indians to hunt." Trial Exh. 58 at 12 (emphasis added). The BIA report concluded that average Indian family income in 1943 was only \$728.46, and that more than half of Indian families had annual incomes below \$500. *Id.* at 13.

In 1946, the U.S. Fish and Wildlife Service issued a report describing the progress made in reservation wildlife management in the Lake States and the Dakotas since passage of the IRA, noting that "the tribes which accepted [the IRA] . . . have been able to formulate constitutions and by-laws which give them the power to set up restrictive regulations for managing their wildlife." (JA 161).⁶ In regard to waterfowl, upland game birds, and small game, the U.S. Fish and Wildlife Service explained that, although these species are not hunted heavily by Indians, there was a need for tribal regulation because the "abundance [of small game] has attracted non-Indian hunters and the increased hunting pressure brought on by them is forcing the Indians to realize that they must manage these species." (JA 171).

In regard to fishing, the U.S. Fish and Wildlife report recognized that Indians "derive considerable income from the sale of special licenses and by serving as guides." (JA 168-69). With respect to furbearers, the Cheyenne River Sioux Tribe's system of regulating the beaver take was commended for providing harvesting on a "sustained yield" and was recognized as the best of the systems studied. *Id.* From 1943 to 1947, reservation wildlife populations increased substantially, and the quantity of game taken on the reservation increased as well. Trial Exh. 93 at 16.⁷ Due to the

⁶ See also JA 166-67 ("White-tailed deer on the Cheyenne River Reservation . . . have been protected since 1937. . . . Within a few years it will be possible to have an open season there under a permit system. . . . Antelope on the Cheyenne River Reservation have been protected since 1937 and this herd has been on the increase since that time. . . . Seventy-five percent of this reservation is suitable for antelope, and the range will support between 1,500 and 2,000 animals. . . . When that population is reached, it will be possible to have a limited annual harvest.").

⁷ In a single year, the Cheyenne River Reservation wildlife harvest was: "46 deer, 31 morning dove, 557 fox squirrel, 4,660 cottontail rabbit, 88 beaver, 2 muskrat, 4 mink, 629 striped skunk, 13 spotted skunk, 73 badger, 11 weasel, 79 raccoon, 263 coyote, 1,895 jack rabbit, 2,488 pheasant, 168 sharp-tailed grouse, 1,401 prairie chicken, 136 Hungarian partridge, 625 ducks and 52 geese, . . . 2,616 channel catfish, 19 buffalo fish, and 51 of other species." Trial Exh. 93 at 16.

Tribe's conservation measures, in 1947 both deer and antelope seasons were opened to members and non-members, and 80 deer and 20 antelope were taken. Trial Exh. 93 at 15.

D. The Flood Control Act of 1944 and the Act of September 30, 1950.

Prompted by severe floods that devastated the lower Missouri River Basin in 1943 and 1944, Congress passed the Flood Control Act of 1944, 58 Stat. 887, which provided for six main stem reservoirs on the Missouri River. The Act did not address tribal rights or power in any way, except to require that "irrigation of Indian trust and tribal lands, and repayment therefor, shall be in accordance with the laws relating to Indian lands." 58 Stat. 891 (*quoted in* A29 n.15).

Representative Case of South Dakota introduced legislation in 1949 to authorize the Chief of the Army Corps of Engineers and the Secretary of the Interior to negotiate contracts with the Cheyenne River and the Standing Rock Sioux Tribes for the acquisition of lands needed for the Oahe Dam and Reservoir and for the protection of Indian interests. Pub.L. No. 870, 64 Stat. 1093 (1950)(the 1950 Act)(A187). Congress recognized that the Cheyenne River Sioux Tribe was being asked to make enormous sacrifices for downstream flood control that would benefit the general public greatly, but that would devastate the Tribe by flooding the best tribal land.⁸ The Department of the Army reported that the best reservation land was the river bottom lands, and that "[p]ractically all of this river bottom land will be inundated, amounting to about 95,500 acres on the Cheyenne River Reservation." *Hearing on H.R. 5372 Before the Subcomm. of the Senate Comm. on Interior and Insular Affairs*, 81st Cong., 2d Sess. 19 (1950)("1950 Senate Hearing"). Senator Gurney of South Dakota, who with Senator Mundt had introduced a companion bill in the Senate, S. 1488, personally attested that the tribal lands sought by the United States were the "richest lands" on

⁸ Because of the Tribe's northern location along the Missouri River, flood damage to the Tribe was historically minimal. "The building of the Oahe Dam and Reservoir is deemed necessary to protect areas in Kansas, Missouri, Nebraska, and Iowa, all of which lie below the Dam site. No benefits will accrue to the Indians of the Cheyenne River and Standing Rock Reservations." H.R. Rep. No. 1047, 81st Cong., 1st Sess. 3 (1950).

the reservation, and wanted "the Indians to be taken care of completely because they have treaty rights." *Id.* at 5-6. The bill contemplated that Congress would fulfill its duty as trustee for the tribe by acting as "the representative of the Indians to see that they get a fair settlement." *Id.* at 36 (remarks of Sen. Gurney).

Congress expected that part of the detriment to the Sioux tribes would be offset by the development of the Oahe Reservoir. Flood control was "going to take away the chance for farming," but Senator Gurney explained that the project was not going to be "entirely bad for the Indians" because "there would be hundreds of miles more of lake shore than there presently [are] of river shore." *Id.* The Indians would "have a lake instead of a river," "better fishing," and "a chance to grow new trees and woodlands on a much longer shore." *Id.* at 7. The Sioux tribes stood to "gain in great measure a lot of the things we are trying to build up out there, recreational areas, fishing and what-not, wildlife of all kinds." *Id.* Senator McFarland, Chairman of the Committee, recognized that the most valuable natural Indian agricultural lands were to be taken without any substitution of irrigated lands, but took comfort from the idea that the tribes should be able to "build up a recreational area there that might be valuable." *Id.* at 8. Senator Gurney agreed, "That is right."

Congress was determined to "provide for the preservation of any treaty rights of the tribe in regard to fishing and hunting and trapping insofar as possible." *Id.* at 13 (remarks of Sen. Mundt). Representative Case noted that "[h]unting and fishing rights also were a part of the rights recognized by treaty in 1851 and 1868 and ratified by Congress. To the extent that these may be impaired or destroyed the tribe is entitled to compensation apart from settlement with the allottees holding individual tracts of land." (JA 187).

The Secretary of the Interior reported that the Cheyenne River Sioux Tribe's natural resources would be severely impaired by the destruction of specific wildlife and the inundation of then-existing recreational areas.⁹ The Department of the Army made similar

⁹ "On the Cheyenne River Reservation, over 400 deer are estimated to live year long in the timbered area which will be inundated. In the bottoms area, pheasants, rabbits and raccoons are numerous. Several hundred bank-denning beaver are annually taken from the same area. Wildlife which provides important food for over 100 families will be lost." 1950 Senate Hearing at 23.

findings. Yet neither the Army nor the Department of the Interior ever suggested that the Tribe's pre-existing authority to license reservation hunting and fishing would be extinguished by the acquisition of lands for flood control.¹⁰ Finally, the 1950 Act authorized the payment of the Tribe's relocation costs in addition to the fair market value of the land and improvements in the project area. The Department of the Army did not object to payment of relocation costs "because of the special trustee relationship between the Government and the Indians." 1950 Senate Hearing at 17.

The 1950 Act acknowledged the duty of the United States to identify "the rights of the Indians, both tangible and intangible," that would be taken for the construction of the Oahe Dam. 1950 Senate Hearing at 4. Against this background, the District Court concluded that the 1950 Act "*sought to preserve treaty hunting and fishing rights.*" (JA 137)(emphasis added).

E. The Cheyenne River Act of 1954.

The Oahe flood control project required 340,000 acres of land, and the Cheyenne River Sioux Tribe was asked to contribute 104,000 acres of the total, or slightly less than 30%. In 1952, the Army Corps of Engineers, the BIA and the Tribe met to negotiate the acquisition of Indian lands. The negotiators were unable to resolve their differences on compensation, so Senator Case and Representative Berry of South Dakota introduced legislation to conclude the transaction. The Joint Senate and House Subcommittee on Indian Affairs held hearings on these bills in 1954.¹¹ During

¹⁰ The Department of the Interior recommended the inclusion of statutory language providing for the "preservation of any treaty rights of the tribe in regard to fishing, hunting, and trapping, insofar as may be practicable under the physical conditions existing when the Oahe project is completed." S. Rep. No. 1737, 81st Cong., 2d Sess. 1-2 (1950). Although the House Bill included this language, the Conference Committee deleted individual references to particular topics, such as a proposed reservation of electric power or the language regarding hunting and fishing, as inappropriate at that preliminary stage of the legislation. 96 Cong. Rec. at 15609 (Rep. Case). The Conference Committee also added a requirement that the agreement be approved by three-fourths of adult members of the Tribe, in accord with the tribal land acquisition provisions of the Fort Laramie Treaty of 1868, Art. 12. See Pub.L. No. 870, § 5(b) (A193).

¹¹ *Hearings on S. 695 and H.R. 2233 Before the Comm. on Interior and Insular Affairs, Joint Senate and House Subcomm. on Indian Affairs*, 83rd Cong., 2d Sess. 9-10 (1954). ("Joint Senate-House Hearings").

the negotiations a "serious area of disagreement concerned compensation for tangible future damages." H.R.Rep. No. 2484, 83rd Cong., 2d Sess. 4 (1954). The Tribe requested damages for the loss of grazing permit revenue because, with the loss of the hay and shelter provided by river bottom lands, the remaining tribal lands would lose value as grazing lands.¹² Tribal negotiators analogized this loss to the lost property tax revenue stream for which state and local governments had been compensated by the Tennessee Valley Authority. (JA 204). The Army, the Department of the Interior, and the Tribe also recognized that the Tribe should be compensated for the wildlife and wild fruit resources that would be destroyed by the flooding.¹³

The government negotiators did not at any time represent that tribal authority to regulate hunting and fishing would be ceded, and compensation was neither requested nor offered for the loss of hunting and fishing license revenue. The District Court found that, although "the Cheyenne River Act compensated the Tribe for grazing permit revenue loss," the Act did not provide any compensation for loss of a revenue stream from hunting and fishing licenses. (JA 124).

The purposes of the Cheyenne River Act were "[t]o provide for the acquisition of lands by the United States required for . . . the construction of the Oahe Dam," and "for rehabilitation of the Indians of the Cheyenne River Sioux." Pub.L. No. 776, Section I, 68 Stat. 1191 (1954)(JA 234). In Section II, the Tribe conveyed to the United States the tribal and allotted lands required for the Oahe Reservoir, including "the bed of the Missouri River so far as it is the eastern boundary" of the reservation, subject to the conditions of the agreement set forth thereafter. The District Court held that the "fact that the Tribe voted to convey limited title to lands necessary for the federal project does not positively denote a

¹² Initially, the Tribe requested \$4,014,467 for grazing revenue loss, but later revised the request to \$2,226,701. H.R.Rep. No. 2484 at 5.

¹³ Initially, the Tribe requested \$1,857,500 to compensate for the destruction of wildlife, wild fruit, and other natural resources, which would be caused by the flooding. H.R.Rep. No. 2484 at 5. The Department of the Army objected that the Tribe's request did not take into account the value of wildlife resources which were to be reserved by the bill, and later, the Tribe reduced its request for compensation to \$1,056,750. *Id.*

relinquishment of tribal jurisdiction over those lands." (JA 102). Both courts below agreed that the Cheyenne River Act did not alter the boundaries of the reservation (A21; JA 102). Petitioner did not appeal this ruling.

Under the express terms of the Act, the Tribe retained important interests in the flood control lands, including "all mineral rights of whatsoever nature at or below the surface within the taken area," Section VI (JA 240), the right to "remove all timber" within the taken area, Section VII (JA 241), and the right to use the taken lands until the Oahe Dam gates were closed. Section IX (JA 242). Most significantly, Section X (JA 243-44) provides:

[T]he said Indian Tribe and the members thereof shall have the right to graze stock on the land between the level of the reservoir and the taking line. . . . The said Tribal Council and the members of said Indian Tribe shall have, without cost, the right of free access to the shoreline of the reservoir including the right to hunt and fish in and on the aforesaid shoreline and reservoir, subject, however, to regulations governing the corresponding use by other citizens of the United States.

Representative Berry suggested that the Tribe should have the right to lease the taken area. The general counsel for the Tribe, Mr. Case, explained that Section X reserved the Tribe's "right to graze cattle on that strip between the water level and the taking line." (JA 211). In addition, Mr. Case explained that the Tribe retained its hunting and fishing rights through Section X, including the right to license those activities by non-Indians: "No white citizen of South Dakota can go on this reservation and hunt unless he has first obtained a license from the Tribal Council. Our right to continue hunting and fishing is to us an extremely valid and valuable right." (JA 214)(emphasis added). The Department of the Army similarly recognized that the Cheyenne River Oahe Act "contemplates reservation of fishing and hunting rights by the Indians." S.Rep. No. 2489, 83rd Cong., 2d Sess 12 (1954).

F. Post-Legislation History.

The United States acquired approximately 104,000 acres of land from the Cheyenne River Sioux Tribe for the construction of the Oahe Dam. Roughly 2,000 acres consisted of land underlying the

Missouri River. Joint Senate-House Hearing at 62-63. The United States also acquired 18,000 acres of land within the reservation from non-Indians through condemnation. Together, these lands constitute the "taken area" of the Army Corps of Engineers. Of course, much of this area is inundated by the waters of the Oahe Reservoir.¹⁴

Since the closing of the Oahe Dam, the Tribe has leased *all* of the taking area lands for grazing, including former non-Indian lands. (JA 67); Trial Exh. 277 (United States Comptroller General Opinion). The Tribe exercises grazing rights according to its tribal grazing code, which is approved by the BIA and enforced with assistance from the BIA. Administering both federal and tribal regulations, the BIA treats taken area lands in the same manner as it treats Indian lands on the reservation. Trial Tr. at 887-88, 896-97, 906-07 (Lilly). The Tribe grazes its buffalo herd along the taken area, P.H. Tr. at 180 (LeBeau) and "[m]uch of the taking area is fenced as parts of range units maintained by Indian ranchers who have grazing rights on the taking area." (JA 12). The District Court found that "[t]he taking land has a distinct Indian flavor since it is owned by the federal government and largely controlled by Indians through grazing agreements." (JA 17)(emphasis added).

The Tribe and the Indian ranchers on the taken area have experienced problems with non-Indian hunters shooting near livestock, leaving gates open, cutting fences, trapping on the taken area and otherwise interfering with the exercise of tribal grazing rights in the taken area. (JA 71). The Tribe's buffalo herd manager, Sebastian LeBeau, testified that he had repeatedly had problems with non-Indian hunters interfering with and endangering the buffalo herd on the taken area and adjacent tribal lands.¹⁵

The taken area is not clearly delineated from adjacent Indian lands by fences or markings (JA 12), and the District Court found

¹⁴ Appended to this brief is a map of the Cheyenne River Sioux Reservation that reproduces in color the information conveyed in black and white by Tr.Exh. 95.

¹⁵ "On weekends we'd get a large amount of non-Indian bird hunters . . . walking up and down the creeks shooting birds. . . . It disturbs our herd. There's also . . . a grave danger of one of the hunters possibly getting attacked by one of our herd bulls There have been instances where I've witnessed boat hunters shooting at birds flying in front of where the herd was standing." P.H.Tr. at 180-82. An Indian rancher, who grazes stock on the taken area, testified that one of his goats had been shot by a non-Indian hunter. *Id.* at 195.

that, "[i]n many cases, hunters pass through Indian land to access the taking area." (JA 12).¹⁶ Consequently, the Tribe and its member ranchers experience difficulties with non-Indian hunters trespassing on Indian trust lands. P.H.Tr. at 180-82. The District Court acknowledged that non-Indian hunters "harassed cattle grazing on the taken area or on tribal lands, failed to close pasture gates, or let down wires on fences," but discounted these problems because they supposedly had not resulted in "extraordinary enforcement efforts" by tribal game wardens. (JA 71).

The District Court found that the Tribe continuously enforced its hunting and fishing regulations against *all* hunters and fishermen on the taken area. (JA 66).¹⁷ Tribal game management efforts were successful enough to receive national attention in hunting periodicals.¹⁸ The Tribe has also invested substantial efforts in its fishing management program,¹⁹ although the program has been hampered by a lack of funds. (JA 73).

Congress allows Indian tribes to contract with the Department of the Interior to perform federal services for their reservations, *see* 25 U.S.C. § 450 *et seq.*, and the Tribe provides fish and wildlife management services under such a contract. Trial Exh. 15. Prior

¹⁶ The District Court noted that even though its opinion on the preliminary injunction concentrated on hunting, "[e]verything said in this opinion regarding hunting and hunters is meant to include fishing and fishermen." (JA 12 n. 1).

¹⁷ The Tribe generally found it unnecessary to enforce tribal wildlife laws in tribal court because non-Indian hunters and fishermen voluntarily complied by purchasing the requisite tribal hunting and fishing licenses. (JA 16-20). In the single tribal court action on record, a non-Indian hunter who had been confronted by federal enforcement officers admitted the jurisdiction of the tribal court and paid a \$150 fine for hunting without a tribal license. *C.R.S.T. v. Key* (Chey. R.Sx. Sup. Ct. 1990), appended to Defendant's Post-Trial Br. as Exh. B.

¹⁸ *See, e.g., Petersen's Hunting* (April, 1984) Trial Exh. 91 ("It took my Sioux guide exactly four minutes to find the first herd of pronghorns. . . [P]ronghorns, whitetail and mule deer, waterfowl, and upland game birds . . . were plentiful because of good management . . . on the Cheyenne River and Standing Rock reservations. . . [P]rogressive tribal administrations are waking up to the fact that, properly managed, the deer, antelope, elk, bison, and other species they've always taken for granted can be a financial bonanza.").

¹⁹ The Tribe sold 200 fishing licenses in 1984 and the tribal game, fish and parks department had a boat to enforce tribal regulations on the rivers. Trial Exh. 91. The Tribe also stocked the artificial lakes on the reservation. One rancher, for example, received 1,000 six-inch rainbow trout in 1984. Trial Exh. 91.

to this lawsuit, the Tribe asked Congress to increase funding under this contract. Congress added \$100,000 specifically to the tribal game, fish and parks budget, bringing the fiscal year 1989 budget to \$170,290. P.H.Tr. at 232-35.²⁰ Consequently, since the trial of this action, the Tribe has acquired more boats, and hired a fishery biologist and a wildlife biologist. Eagle Butte News, Nov. 12, 1992, at 7. The Tribe has also assisted the State in fish-stocking efforts, *see* Agreement Between Cheyenne River Sioux Tribe and South Dakota — Egg Taking, April 13, 1992, and has independently stocked 20,000 walleye fingerlings in Lake Oahe. Eagle Butte News, Oct. 22, 1992, at 5. Indeed, the District Court found that "notwithstanding this litigation, the state conservation officers and tribal game wardens appear to enjoy an amicable relationship." (JA 25). The Tribe has also assisted federal authorities by setting up roadside check points for the enforcement of federal and tribal wildlife laws.

The District Court found that "[n]either the State nor the Tribe can lay claim to a program of wildlife management without crediting federal agencies with some financial aid and management assistance." (JA 72). The State has received the bulk of the money necessary to finance its fisheries projects through the Dingell-Johnson Act, 16 U.S.C. § 777.²¹ "Federal agencies like the BIA,

²⁰ Congress specified \$100,000 for the tribal game, fish and parks program in both 1989 and 1990, and those funds became part of the base budget in 1991.

²¹ The State's fish-stocking programs must be understood in context. The State's own specialist in charge of fisheries testified that the principal fisheries on the Oahe Reservoir in South Dakota are walleye, salmon, and to a lesser extent northern pike and smallmouth bass. Trial Tr. at 38. The northern pike flourished only for a time just after the closing of the dam gates because of the natural habitat created by the flooding of the bottom lands. *Id.* at 39. The salmon live primarily in cold water habitat in the lower third of the Oahe outside the reservation, and smallmouth bass were not shown to have been established in reservation waters. Thus, according to State officials, only the walleye is an important fish in reservation waters. *Id.* at 252, 305-06. The walleye is native to, and spawns naturally in, the Grand River on the Standing Rock Reservation, and the Cheyenne and the Moreau Rivers on the Cheyenne River Reservation. *Id.* at 39-40. Walleye were sustained by natural reproduction for many years, and the State did not begin stocking walleye until 1983. Even since the stocking began, natural walleye reproduction remains far more significant than State stocking. In the upper half of the Oahe Reservoir, the walleye fishery is primarily replenished by natural reproduction and the State estimates a harvest of 200,000 to 250,000 walleye annually. *Id.* at 85; Trial Exh. 172 at 5. The projected walleye harvest in the lower half of the Oahe

the U.S. Fish & Wildlife Service, and the U.S. Army Corps of Engineers cooperate with state and tribal governments in promoting fish and wildlife conservation and public recreation." (JA 71).

G. This Litigation.

In 1988, during negotiations to renew the state-tribal wildlife management agreement, the State refused to recognize the significance of tribal grazing rights in the taken area, and refused to acknowledge that tribal buffalo and grazing stock must be protected from hunting activities. Trial Tr. at 662-63. In the absence of an agreement, the Tribe announced its intentions to enforce tribal hunting and fishing regulations on the taken area. The State then initiated this litigation.

SUMMARY OF ARGUMENT

This case presents the narrow question whether the Cheyenne River Sioux Tribe may continue to license hunting and fishing by non-Indians on reservation land, where the Tribe has always regulated such activity, after ownership of that land — although not all other interests in it — has been acquired by the United States for a flood control project. Precisely how tribal fish and game ordinances are to be civilly enforced on the taken area, and whether by the United States or the Tribe itself, and whether the State of South Dakota may enjoy concurrent jurisdiction, are issues not presented here.

It is undisputed that the Tribe lawfully and responsibly exercised conservation and licensing power prior to the taking of the land by the Cheyenne River Act in 1954. The Tribe's pre-existing, traditional power to regulate hunting and fishing was confirmed by Congress in the Indian Reorganization Act of 1934 and vested in the Tribal Council. Neither the Flood Control Act of 1944 nor the Cheyenne River Act of 1954 even addressed the issue of tribal licensing power on the taken area, let alone purported to divest the Tribe of such authority.

Reservoir where the State stocks the fish is only 30,000 to 35,000 fish, Trial Tr. at 84; Exh. 172 at 5, and the walleye eggs that are developed by the State as hatchery fish in fact come from the Cheyenne, Moreau, and Grand Rivers on the Standing Rock and Cheyenne River Reservations. Trial Tr. at 52.

— The purposes of this legislative regime were to acquire the land necessary for flood control projects on the Missouri River and to rehabilitate the Tribe and to compensate it fully, so as to minimize the impact of the dramatic displacement wrought by the construction of the Oahe Reservoir. To that end, the United States acquired only those interests in the land necessary for its flood control projects and reserved many other rights to the Tribe. There is nothing about continued tribal licensing jurisdiction over the taken lands that is in any way incompatible with the federal government's flood control program, and, indeed, the recognition of such tribal power promotes the rehabilitation of the Tribe and tribal government that was Congress's other legislative goal.

Moreover, reading the Cheyenne River Act to divest the Tribe of authority to license hunting and fishing on the taken area would raise serious questions. The United States held the land in question in trust for the Tribe, and it therefore bore the duty of a trustee to specify precisely which interests and benefits the Tribe was losing when the United States proposed to acquire the land for its own purposes. Yet there was never any indication in the negotiations or congressional hearings that the Tribe would forfeit its right to license hunting and fishing on the taken area and thereby lose the valuable source of revenue that right represented. Nor was any compensation paid for the loss of this revenue stream, in contrast to the itemized compensation the Tribe received for the loss of grazing permit revenue wrought by the inundation of valuable river bottom land. Therefore, reading the Cheyenne River Act to divest the Tribe's right to license hunting and fishing could well create a claim for an uncompensated taking against the United States. That result would be particularly bizarre, since the United States, as the only other party to the transaction sealed by the Cheyenne River Act, now appears before this Court to agree with the Tribe that that statute did not divest the Tribe of its licensing power over the taken area. The contrary, third-party opinion of the Petitioner is entitled to no weight.

Recognizing that the Tribe retains the regulatory power over wildlife that Congress confirmed in the Indian Reorganization Act would thus comport with the principles this Court has long applied to interpret Indian treaties and statutes. This Court's decisions in *Montana v. United States*, 450 U.S. 544 (1981), and *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*, 492

U.S. 408 (1989), did not question those settled rules of construction, and turned on the operation and effect of a federal law, the Allotment Act, which is not implicated here.

Tribes were held to have lost regulatory power over non-members in *Montana* and *Brendale* because the land in question had been alienated in fee simple to non-member settlers, and the continued exertion of tribal regulatory authority over them on their own land could not be reconciled with the Allotment Act's goal of extinguishing all tribal jurisdiction and governing power. In stark contrast, the Cheyenne River Act at issue here alienated certain interests in the taken lands to the United States, not to private settlers, and one of the Act's primary goals was to enhance and rehabilitate the Tribe, not to dissolve it. Petitioner's contention that *Montana* dictates a reversal in this case amounts to an attempt to extract dicta from the particular factual context of that opinion and to generalize it into a new field theory for tribal civil regulatory authority over non-Indians.

ARGUMENT

I. THE TRIBE HAS AUTHORITY TO REGULATE HUNTING AND FISHING BY NON-INDIANS ON THOSE PORTIONS OF THE FLOOD CONTROL AREA THAT LIE WITHIN THE CHEYENNE RIVER SIOUX RESERVATION.

A. AT ISSUE IS ONLY THE TRIBE'S AUTHORITY TO SET SUBSTANTIVE TERMS ON WHICH HUNTING AND FISHING MAY OCCUR ON FEDERAL LAND WITHIN THE RESERVATION; THIS CASE PRESENTS NO QUESTION ABOUT THE PROCESSES THROUGH WHICH OR THE FORUMS IN WHICH TRIBAL REGULATIONS MAY BE ENFORCED.

It is important to note what is *not* at issue in this case, particularly since this is in some respects obscured by Petitioner's Brief. *First*, this case does not present the issue of tribal regulatory jurisdiction over conduct on land owned in fee by non-Indians, which was presented in *Montana v. United States*, 450 U.S. 544 (1981), and *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*, 492 U.S. 408 (1989). Here, the District Court held that the Tribe has no "authority to regulate non-Indian

hunting and fishing on non-Indian fee land," and the Tribe did not appeal that portion of the decision. (A14).

Second, this case presents no issue of tribal jurisdiction over hunting and fishing by non-member Indians on the taken area or on non-member fee lands. (A18). Despite the District Court's ruling on this issue, and the occasional confusion in the Petitioner's Brief between non-Indians and non-member Indians (Indians who are not members of the Cheyenne River Sioux Tribe) (Pet.Br. 21 n.13, 23 n.14, 24), the Court of Appeals correctly noted that the "issue of tribal jurisdiction over non-member Indians was neither pled nor tried; the complaint was limited to the question of jurisdiction over non-Indians." (A18). Accordingly, the Eighth Circuit vacated that portion of the trial court's decision. (A51). Petitioner did not seek certiorari on this ruling.

Third, this case raises no issue of Tribal Court criminal jurisdiction over non-Indians. The District Court dismissed Petitioner's claims concerning tribal criminal jurisdiction (JA 37, 88), because the court found there was no evidence that the Tribe had ever imposed criminal sanctions against a non-Indian for violating tribal fish and game ordinances (JA 66), and because both the Tribe (JA 85) and the Tribal Court (JA 87) have consistently disavowed criminal jurisdiction over non-Indian hunting and fishing.

It is crucial to recognize that, as the Question Presented states on its face, only tribal authority "*to regulate*" the terms of non-Indian hunting and fishing on the taken area is at issue here. This case presents no question of how or in what forum tribal fish and game license requirements or other ordinances may be *enforced*. This distinction between licensing power and enforcement jurisdiction is familiar in Indian law. For example, it is settled that violations of Sioux hunting and fishing ordinances by non-members on the taken areas of the Missouri River are subject to federal prosecution under the Lacey Act, 16 U.S.C. § 3372, without regard to whether the particular tribe itself could undertake enforcement in its own courts. *United States v. Big Eagle*, 881 F.2d 539, 540-42 (8th Cir. 1989), *cert. denied*, 493 U.S. 1084 (1990). *See also New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 342 n.27 (1983)(tribe may refer non-member violations of its game and fish ordinances to

federal enforcement officers).²² For more than half a century, the Tribe has expressly relied on the federal government for assistance in enforcing substantive tribal hunting and fishing laws. See Tribal Ordinance No. 3 (1937)(JA 158).

Accordingly, the *fourth* question this case does *not* present is any issue about the scope of Tribal Court civil enforcement of hunting and fishing regulations. In this respect Petitioner's Brief is especially misleading. Petitioner raises the specter of draconian tribal civil penalties on sportsmen (Pet.Br. 29-30 & n.22), alludes to the possibility of exclusionary regulations (Pet.Br. 29-30), and attacks the integrity and fairness of tribal courts (Pet.Br. 25 & n.18), while ignoring the District Court's undisputed finding that the Tribe has never "imposed severe or unfair penalties on non-Indian" violators. (JA 19-20).²³ Moreover, the Court of Appeals correctly

²² The Lacey Act makes it unlawful for any person to acquire or sell any fish or wildlife taken in violation of federal law or in violation of any Indian tribal law. 16 U.S.C. § 3372(a)(1). The defendant, Big Eagle, a member of the Crow Creek Sioux Tribe whose reservation is on the eastern shore of the Missouri River, was caught fishing without a license west of the mid-point of the river channel, which is the boundary for the Lower Brule (a Sioux tribe) Reservation on the western side of the Missouri. 881 F.2d at 540. Since prosecution could in any event be had in a federal court under the Lacey Act, *Big Eagle* held that "the crucial inquiry is whether the acts complained of took place within the Reservation and not, as [defendant] Big Eagle insists, whether the Lower Brule Tribe *itself* has the power to prosecute." *Id.* at 541 (emphasis added). Lower Brule Tribal law included an arrangement with the State of South Dakota whereby anyone fishing with a net in this portion of the river had to have either a state or a tribal license. *Id.* at 541. The violation of this incorporated arrangement provided the predicate for federal jurisdiction under the Lacey Act: "We hold that Big Eagle violated *tribal law* by failing to obtain either a state or tribal permit as required by the settlement agreement." *Id.* at 542 (emphasis added).

²³ This Court has never countenanced such assaults on the perceived deficiencies of tribal courts as a basis for restricting tribal civil jurisdiction. "Tribal courts have repeatedly been recognized as appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 65 (1978). See also *Iowa Mutual Insurance Company v. LaPlante*, 480 U.S. 9, 18-19 (1987) ("We have rejected similar attacks on tribal court jurisdiction in the past. The alleged incompetence of tribal courts is not among the exceptions to the exhaustion requirement."). In particular, Petitioner's purported concern about the Tribal Court being subordinate to the political branches of tribal government is misinformed. The Constitution of the Cheyenne River Sioux Tribe, as approved by the Secretary of Interior, mandates separation of powers by expressly providing that the Tribal Council may not review decisions of the Tribal Courts. Chey.R.S. Const. Art. IV, § 1(k) (1992). Finally, we note that the Tribe's three appellate

noted that, under the case as pled in the complaint and tried before the District Court, "[t]he scope of the Tribe's regulations are [*sic*] not presently at issue," and this case therefore does not present any question regarding the Tribe's power to discriminate against non-Indian sportsmen or to exclude them altogether. (A43).²⁴

Federal judicial speculation in this case about the nature and scope of civil enforcement of hunting and fishing regulations in the Cheyenne River Sioux Tribal Court would be premature. As this Court has unanimously held, the complex issue of "the existence and extent of a tribal court's jurisdiction" should be addressed "in the first instance in the Tribal Court itself." *Nat'l Farmers Union Ins. Co. v. Crow Tribe*, 471 U.S. 845, 855-56 (1985)(abstaining in favor of civil suit between Indian and non-Indian in tribal court asserting jurisdiction to regulate conduct of non-Indian on state land).²⁵

Fifth, and finally, this case does not present the question whether the State of South Dakota has any regulatory authority over non-Indian fishing and hunting in the taken area. The District Court found that South Dakota "made no attempt to show how its interests would be injured [even] if the Tribe were to exercise exclusive jurisdiction over the areas in dispute." (JA 108). But, while

court justices include Professor Robert Clinton, whose treatise on Indian Law has been relied upon by this Court, and Professor Frank Pommersheim of the University of South Dakota School of Law.

²⁴ Petitioner also objects that tribal civil licensing power over non-Indians amounts to un-American regulation without representation. Pet.Br. 23-26. The Court has often heard and rejected this argument before. See, e.g., *United States v. Mazurie*, 419 U.S. 544, 557-58 (1975). Tribal authority is always subject to limitation and adjustment by Congress, *id.*; the Tribe's wildlife ordinances were reviewed and approved by the Secretary of the Interior; and non-Indians can petition the Tribal Court for relief. In any event, Petitioner's argument proves far too much: if a polity could not subject non-members to its licensing rules within its territory, then South Dakota would not be able to justify applying its own hunting and fishing rules to Nebraskans and others who are not represented in the South Dakota legislature.

²⁵ See also *Iowa Mutual Insurance Company v. LaPlante*, 480 U.S. 9, 16 (1987)("Adjudication of such matters by any non-tribal court also infringes upon tribal lawmaking authority, because tribal courts are best qualified to interpret and apply tribal law."). The Tribe pressed the *Nat'l Farmers Union* exhaustion argument in both the District Court (JA 86) and the Eighth Circuit. (Tribe's Opening Br. at 41; Tribe's Reply Br. at 28).

Petitioner emphasizes its argument for exclusive state regulation (Pet.Br. 26-28) — as an alternative to concurrent jurisdiction with the Tribe — that issue is simply not before this Court, for Petitioner failed to plead the issue in its complaint or to try it in the District Court. (A20 n.13; JA 107-08).²⁶

In sum, much of what the Petitioner argues to this Court is utterly irrelevant, and many of the issues that Petitioner presses as vital elements of its vision for wildlife management on and about the Oahe Reservoir are simply not before the Court.

B. THE CHEYENNE RIVER SIOUX TRIBE HISTORICALLY POSSESSED AND EXERCISED CONGRESSIONALLY CONFIRMED POWER TO LICENSE HUNTING AND FISHING ON THE FLOOD CONTROL AREA.

1. Historical Antecedents: The Tribe Owned the Western Half of the Bed and the Western Bank of the Missouri River.

The aboriginal territory of the Sioux Nation included the Missouri River, its tributaries, and adjacent riparian lands. In the Fort Laramie Treaty of 1868, the United States established the Great Sioux Reservation and expressly recognized the Sioux Nation's ownership of the bed and banks of the Missouri River as part of the peace settlement that concluded the Powder River War.²⁷ The

²⁶ Assuming *arguendo* that South Dakota has concurrent jurisdiction over the taken area, Petitioner's alarm about unworkable "checkerboard" wildlife licensing, Pet.Br. 27-28, is unsupported in the record. Petitioner did not even request a finding of fact on this issue, and District Court in fact concluded, based on the testimony of South Dakota's own wildlife officials, that its management program has been unimpaired by the mix of state and tribal control and that state and tribal game wardens work well together. (JA 24-25). See also A48. As this Court has frequently admonished, Petitioner's policy concerns should be addressed to Congress. *County of Yakima v. Yakima Indian Nation*, 112 S.Ct. 683, 692 (1992); *Duro v. Reina*, 110 S.Ct. 2053, 2066 (1990).

²⁷ The United States desired to secure passage for settlers in route to the Oregon territory and to end the Powder River War, which it was losing. See page 2 & note 3, *supra*. The resolution of the conflict and the formation of the Great Sioux Reservation therefore presented a public exigency, *United States v. Sioux Nation*, 448 U.S. 371, 374-76 & n.4 (1980), and this case must be distinguished from *Montana v. United States*, 450 U.S. 544, 556 (1981), where "the Crow Indians . . . presented no 'public exigency.'"

Treaty of 1868 reserved "the following district of country . . . commencing on the east bank of the Missouri River . . . thence along the low water mark on the east bank of the Missouri River," and crossing the river to include all of western South Dakota up to the 104th meridian. Treaty of 1868, Art. 2 (emphasis added); *Sioux Tribe v. United States*, 316 U.S. 317, 319 (1942).²⁸

When the Cheyenne River Reservation was created by the division of the Great Sioux Reservation in 1889, Congress set its eastern border at the "center of the main channel of the Missouri River, including also entirely within said reservation all islands" in the river. 25 Stat. 888.²⁹ In 1954, during hearings on the bill to acquire Indian lands for flood control, Congress and the Army Corps of Engineers acknowledged that the Tribe owned the western half of the bed of the Missouri River. Joint Senate-House Hearings at 98 (1889 Act leaves "no doubt at all of the Indian ownership") (remarks of Rep. Berry). Accordingly, Congress compensated the Tribe in the Cheyenne River Act for "the bed of the Missouri River so far as it is the eastern boundary of said Cheyenne River Reservation" and for the islands in the river. Public Law 776, § II (JA 236). Moreover, the Act expressly reserved mineral rights in the western bed and bank of the Missouri River to the Tribe. (JA 240). Petitioner has never contested that the Tribe owned the western half of the bed and the western bank of the Missouri River.³⁰

²⁸ Far less precise language has been held "expressly" to convey title to the bed of a navigable river. Compare *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 635 (1970) (holding that "the middle of the main channel" was an express grant); with *Packer v. Bird*, 137 U.S. 661, 672 (1891) (holding that a grant of land bounded by the *near* bank did not convey islands in the bed of a navigable river, but that the bed and banks may be conveyed if terms of grant embrace "the land under the waters of the stream").

²⁹ Later that year, the State of South Dakota disclaimed all right and title to lands held by Indians, and acknowledged the federal government's exclusive jurisdiction over Indian lands. S.D. Const. Art. XXVI, § 18.

³⁰ Petitioner makes a passing allegation in a footnote that tribal ownership of this part of the river bed "is not a closed issue," Pet.Br. 34 n.25, but offers neither argument nor authority on the matter.

2. The Original Authority of the Cheyenne River Sioux Included the Power to Regulate Hunting and Fishing.

The Sioux Nation regulated wildlife resources under its original authority as an Indian tribe. Access to and control of wildlife was "not much less necessary to the existence of the Indians than the atmosphere they breathed." *United States v. Winans*, 198 U.S. 371, 381 (1905). Tribal regulation of hunting was vital to the very survival of the Sioux. On a buffalo hunt, for example, a hunter who attacked ahead of the main hunting party could spook the herd and spoil the chance for a successful hunt by the tribe as a whole. Each hunter was therefore required to wait for the leader's signal, and no more game was taken than was needed. Hunting rules were enforced against *anyone* in tribal territory.³¹

Although the Fort Laramie Treaty of 1868 vested the United States with criminal authority over interracial crimes throughout the Great Sioux Reservation, *Ex Parte Crow Dog*, 109 U.S. 556, 562-63 (1883), it did not disturb the Sioux Nation's civil authority over non-Indians. *Cf.* 7 Op. Atty. Gen. 175 (1855). In the fall of 1868, General Harney, the commanding officer of the Sioux Indian District and a signatory to the Fort Laramie Treaty, 15 Stat. 635, told Sioux Chief Tall Mandan, another signatory, that the Chief had the authority to enforce the Sioux "social laws" against "anyone, white or Indian." Trial Exh. 93 at 3.

As the Senate Judiciary Committee explained in 1879, Indian tribes are "invested with the right of self-government and jurisdiction over persons and property within the limits of the territory they occupy, *except so far as that jurisdiction has been restrained and abridged by treaty or act of Congress.*" S.Rep. No. 698, 45th Cong., 2d Sess. 1-2 (1879) (emphasis added), *quoted in Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 140 (1983). The Senate's view of tribal authority confirms the earlier views of the Attorney

³¹ See S. Pond, *supra*, at 46 (Gov. Henry Hastings Sibley subject to rules); *cf.* K. Llewellyn & E. Hoebel, *THE CHEYENNE WAY* 111-13 (1987) (the Cheyenne Indians applied similar rules to Dakota Indians among them); *see also* R. Hassrick, *supra*, at 176-78 (rules applied to antelope hunt).

General.³² Against this background, it is clear that in 1934 the Cheyenne River Sioux Tribe retained, as a part of its original authority, confirmed by treaty and federal legislation, the power to regulate all hunting and fishing on the Indian lands adjacent to and underlying the Missouri River. Fort Laramie Treaty of 1868; 1877 Act.³³

3. Through the Indian Reorganization Act of 1934, Congress Confirmed the Tribe's Existing Authority to License Hunting and Fishing.

Congress enacted the Indian Reorganization Act (IRA) in 1934 with the specific purpose of encouraging Indian tribes to revitalize their tribal governments. S. Rep. No. 1080, 73rd Cong., 2d Sess., 1 (1934); *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 14 n. 5 (1987). Through the IRA, Congress provided for constitutional organization of tribal governments, and expressly authorized those tribal governments to exercise "all powers vested in any Indian tribe . . . by existing law." 48 Stat. at 987; 25 U.S.C. § 476. The IRA embodied President Roosevelt's new policy of extending to Indian

³² In addressing the authority of a tribal court in a case involving non-Indians, Attorney General Cushing declared that "there is no provision of treaty, and no statute, which takes away from the Choctaws jurisdiction of a case like this. . . . such questions . . . remain subject to the local jurisdiction of the Choctaws." 7 Op. Atty. Gen. 175, 179-81 (1855), *quoted in National Farmers Union Ins. Co. v. Crow Tribe of Indians*, 471 U.S. 845, 854-55 (1985).

³³ Even the General Allotment Act of 1887 did not disturb tribal jurisdiction over Indian trust land. *See Montana v. United States*, 450 U.S. at 557. Allotment legislation has no bearing on nearly all of the territory at issue in this case, the 104,000 acres acquired from Indians and the Tribe itself, which were not alienated under that Act. The only conceivable relevance of the Allotment Act policy to this case might be with respect to the remaining 18,000 acres of the taken area, acquired from non-Indians under the Flood Control Act of 1944. The record does not reveal how these lands fell into non-Indian ownership. Accordingly, the Court of Appeals remanded to the District Court to determine the fate of tribal licensing power over these lands under the *Montana* standard. (A45-46). Yet the Tribe sees no reason why any suspension of congressionally confirmed tribal licensing power wrought by alienation of this land should continue once that land has been reacquired by the United States. Surely any supposed taint of any policy lurking behind the original alienation by the Tribe of those 18,000 acres has been erased, and the relevant policy is now that of the Flood Control Act and the Cheyenne River Act, pursuant to which the land was taken by the United States.

tribes "the fundamental rights of political liberty and *local self-government*." S. Rep. No. 1080, at 3 (emphasis added). Congress intended the IRA to "stabilize the tribal organization of Indian tribes by *vesting* such tribal organizations with real, though limited authority." *Id.* at 1 (emphasis added). To the extent that any given tribal power was an attribute of sovereignty possessed by Indian tribes when the IRA was passed, Congress intended the statute to preserve those powers for all Indian tribes that adopted a formal organization under the Act. *See Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 195 n. 6 (1978) ("the tribal council is intended to have such powers as are vested 'by existing law'"). In *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 337 n. 20 (1983), this Court held that tribal licensing authority over hunting and fishing on Indian land was among the "existing powers" of Indian tribes "confirmed" and "'vested'" by the IRA.

Shortly after the passage of the IRA, the Solicitor of the Department of the Interior identified definitively the "existing powers" expressly acknowledged by Congress in the IRA. *Powers of Indian Tribes*, 55 I.D. 14 (1934). The Solicitor's opinion found that Indian tribes retained all of their original powers which had not previously been *expressly* divested by treaty or act of Congress. 55 I.D. at 14-19. *See also* F. Cohen, *HANDBOOK OF FEDERAL INDIAN LAW* 439 (1958 ed.).³⁴

The Cheyenne River Sioux Tribe accepted the provisions of the Indian Reorganization Act, and adopted a constitution and by-laws in 1935. Accordingly, the Tribe "preserved all powers conferred by § 16 of the Indian Reorganization Act." *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 134 (1983). "Tribal power over reservation hunting and fishing was unquestionably vested prior to 1934." *Mescalero Apache Tribe v. New Mexico*, 630 F.2d 724, 732 (10th Cir. 1980), *vacated for reconsideration (in light of United States v. Montana)*, 450 U.S. 1036 (1981), *reinstated*, 677 F.2d 55 (10th Cir. 1982), *aff'd*, 462 U.S. 324, 337 (1983) (tribe retains "right to regulate the use of its resources by members as well as non-members. . . . [T]ribes in general retain this authority. . . .

³⁴ The Solicitor's 1934 opinion has been treated by this Court as definitively interpreting the IRA. *See, e.g., Merrion*, 455 U.S. at 139; *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 153 (1980).

[T]his aspect of tribal sovereignty has been expressly confirmed by numerous federal statutes," citing the IRA). The Tribe's Constitution and By-Laws were approved by the Secretary of the Interior. Article VII, § 2 of the By-Laws authorizes the Tribal Council "to pass ordinances for the control of hunting and fishing upon the reservation," to "enforce such ordinances and cooperate with federal and state" conservation efforts, and to "issue licenses for hunting and fishing." (JA 281). The District Court found that after the passage of the IRA, "the Tribe enacted ordinances, . . . approved by the Bureau of Indian Affairs (BIA), which required non-members to obtain a tribal permit to hunt or fish on the reservation." (JA 65-66).

The District Court found that the Tribe promptly made significant progress in wildlife management in the 1930s and 1940s. (JA 73). Wildlife was an important source of both food and income; there was substantial sport fishing by both Indians and non-Indians, Trial Exh. 58; Indians "derive[d] considerable income from the sale of special licenses and by serving as guides" (JA 168-69); the abundance of small game attracted non-Indian hunters and necessitated Indian management efforts (JA 171); and tribal conservation measures restored the deer and antelope herds, enabling a hunting season for members and non-members as early as 1947. *See generally* pages 4-6, *supra*. Thus, the Cheyenne River Sioux Tribe's wildlife management program was a paradigm of the revitalized tribal government envisioned by Congress in the IRA, and John Collier, the Commissioner of Indian Affairs and a principal proponent of the IRA, commended the Tribe's wildlife management program as one of the ten best in the nation. Trial Tr. at 760.³⁵

³⁵ Substantial benefits accrue to non-Indians as a result of the Tribe's wildlife regulation. In addition to the availability through the years of hunting opportunities created by the Tribe's restoration of game herds on tribal lands, the District Court found that, because there is little food or cover on the taken area, adjacent "tribal lands contribute to the well-being" of game herds on the taken area as well. (JA 70) ("Virtually all the land adjacent to the taken area is [tribal] trust land."). Non-Indian sportsmen on the taken area also benefit from the Tribe's regulation of its own members, which prevents members from depleting the wildlife resources of the taken area and the reservation as a whole, preserving recreational opportunities for all. (The District Court found that effective wildlife management, whether concurrent or uniform, must encompass the entire reservation. (JA 70)). It is only equitable that non-Indian sportsmen support, through license fees, the tribal

In its 1948 report, *HUNTING AND FISHING RIGHTS OF INDIANS ON THEIR RESERVATIONS*, the BIA confirmed that, "unless [a] treaty specifically surrendered hunting and fishing rights, they and their control remained absolutely in the Indian Tribe, without power of the State or Federal Government to interfere therewith, without the consent of the Indians." Trial Exh. 93 at 17 (emphasis added). "Each case would require an independent study of the controlling instruments." *Id.*

Thus, when Congress began the process of acquiring the Indian lands on the Cheyenne River Sioux Reservation necessary for the construction of the Oahe Reservoir, the Tribe had the right and authority, confirmed by Congress and approved by the Secretary of the Interior, to license hunting and fishing by both tribal members and non-members on the tribal and individual Indian trust lands which later became the taken area.

The factual background prior to the Cheyenne River Act, as reported by agencies of the United States, was that: 1) the Tribe was in fact licensing both tribal member and non-member hunting and fishing on tribal lands and waters; 2) the Tribe had an exemplary wildlife management program, including a successful big game management strategy which restored big game herds on the reservation; 3) "Indians and Whites" both did sport fishing, and license revenue was significant on reservations in the Lake States and the Dakotas; and 4) wildlife resources were an important source of food and cash income for poverty-stricken tribal members on the Cheyenne River Sioux Reservation.

Accordingly, the District Court found that "the Tribe has always asserted jurisdiction over hunting and fishing activities on the reservation," including "the taken area," and that "[t]he Tribe has not acquiesced to any state assertion of jurisdiction over hunting and fishing activities on the reservation." (JA 65).

conservation and management programs from which the non-Indians, like all others who come to the area, directly benefit. *Merrion*, 455 U.S. at 137-38.

C. SETTLED PRINCIPLES OF LAW DICTATE THAT A TRIBE MAY BE DIVESTED OF RIGHTS SECURED BY TREATY OR STATUTE ONLY BY A CLEAR MANIFESTATION OF CONGRESSIONAL INTENT.

1. The General Rule of Construction in Indian Law Is That Ambiguities Are To Be Read in The Tribe's Favor.

As the Court recently observed, it is "a principle deeply rooted in this Court's Indian jurisprudence" that "'statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit.'" *County of Yakima v. Yakima Indian Nation*, 112 S.Ct. 683, 693 (1992)(quoting *Montana v. Blackfeet Tribe*, 471 U.S. 759, 766 (1985)). In particular, the Court has "required that Congress' intention to abrogate Indian treaty rights be clear and plain." *United States v. Dion*, 476 U.S. 734, 738 (1986). See also *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 690 (1979). This Court does "not construe statutes as abrogating treaty rights in 'a backhanded way.'" *Dion*, 476 U.S. at 739. In the absence of an explicit divestiture, there must be "'clear indications' that Congress has implicitly deprived the Tribe of its power." *Merrion*, 455 U.S. at 152.

2. The Special Trust Relationship Between A Tribe And The Federal Government Requires That Statutes Or Agreements Alleged To Divest Tribal Rights Be Read In Favor Of The Tribe.

"The canons of construction applicable in Indian law are rooted in the unique trust relationship between the United States and the Indians." *Oneida County v. Oneida Indian Nation*, 470 U.S. 226, 247 (1985). The United States acknowledged this protectorate relationship with the Teton Sioux as early as 1815, in its first treaty between the two nations. Treaty with the Teton of 1815, 7 Stat. 125. Because the United States "assumes the responsibilities of virtual guardianship, bound by every moral and equitable consideration to discharge its trust with good faith and fairness," *United States v. Payne*, 264 U.S. 446, 448-449 (1924), its conduct must

"be judged by the most exacting fiduciary standards." *Seminole Nation v. United States*, 316 U.S. 286, 297 (1942).

The trust relationship is no mere metaphor in this case, because "[a]ll of the necessary elements of a common-law trust are present: a trustee (the United States), a beneficiary (the Indian [tribe]), and a trust corpus (Indian . . . lands)." *United States v. Mitchell*, 463 U.S. 206, 225 (1983). See also *United States v. Mitchell*, 445 U.S. 535, 547-48 (1980) (White, J., dissenting) (same); *United States v. Cherokee Nation of Oklahoma*, 480 U.S. 700, 707 (1987) ("It is, of course, well established that the Government in its dealings with Indian tribal property acts in a fiduciary capacity"). The lands acquired by the Cheyenne River Act had been held in trust for the Tribe and its members by the United States, and since that land was acquired by the trustee not to benefit the Tribe but for the United States' own reservoir project, there was a legitimate concern about self-dealing.

In these circumstances, a trustee has a duty fully to disclose the nature and value of the interests to be acquired and to compensate the beneficiary in full. *Shoshone Tribe v. United States*, 299 U.S. 476, 497 (1937) (Cardozo, J.) (government trust power over tribal lands "does not extend so far as to enable the Government . . . 'to appropriate them to its own purposes, without rendering . . . just compensation'"); *United States v. Sioux Nation*, 448 U.S. 371, 408-409, 415 (1980) (quoting and applying *Shoshone Tribe*); G. Bogert, *THE LAW OF TRUSTS AND TRUSTEES* §542 (1978 & Supp. 1992) (duty of "utmost frankness and fair play"). The United States declared its intent to fulfill this obligation during the Senate Hearings on the acquisition. 1950 Senate Hearings at 4 (United States would undertake a complete analysis of all the interests and rights to be taken); *id.* at 6 ("Indians to be taken care of completely") (remarks of Sen. Gurney).

3. Principles Of Contract Law Require That Agreements Between Tribes And The Federal Government Be Read As Those Parties Themselves Read The Agreements.

Among the most basic principles of contract interpretation is that "[t]he parties themselves know best what they have meant by their words of agreement." Official Comment 1 to U.C.C. § 2-208. See

also WILLISTON ON CONTRACTS § 623 (3d ed.). "Where the parties have attached the same meaning to a promise or agreement or a term thereof, it is interpreted in accordance with that meaning." Restatement (2d) of Contracts, § 201(1). The force of the parties' mutual interpretation has even been termed "conclusive." *Sunbury Textile Mills, Inc. v. Commissioner of Internal Revenue*, 585 F.2d 1190, 1196 (3d Cir. 1978).

"Accordingly, it is the intention of the parties . . . that must control any attempt to interpret the treaties. When Indians are involved, this Court has long given special meaning to this rule." *Washington State Commercial*, 443 U.S. at 675. The Court applied this rule in *Winters v. United States*, 207 U.S. 564 (1908), which presented the question whether the tribes retained water rights in an agreement ceding large portions of the reservation to the United States. The Court framed the issue as one of contract interpretation, *id.* at 575, and noted that the parties, the United States and the tribes, contended that their agreement implicitly reserved the tribes' water right "to the full extent in which it had been vested in them under former treaties," *id.* at 573, while third-party strangers to the agreement contended that the tribes' failure to expressly reserve those rights acted as a forfeiture. *Id.* at 571. The Court was swayed by the United States' and tribes' joint insistence as to the meaning of their contract, and refused to "believe that the Indians were awed by the power of the government or deceived by its negotiators." *Id.* at 576. The tribe's and the government's jointly negotiated and jointly held interpretation of their agreement prevailed: "The Government is asserting the rights of the Indians." *Id.* at 576.³⁶

If even the federal government "[o]bviously . . . must man the laboring oar in any effort to contradict the stated intent of the parties" when only a routine private contract to which the government is a stranger is at issue, *Sunbury Textile Mills*, 585 F.2d at 1197, *a fortiori* a third-party such as the Petitioner bears an onerous

³⁶ Although *Amici* States discuss only the category of substantive tribal right at issue in *Winters* — usufructuary rights necessary to life on the reservation, see *Brief Amici Curiae of Montana et al.* at 6 n.1 — Justice McKenna's characterization of the determinative issue in the case makes clear that the holding in *Winters* is based on the interpretive principles discussed in the text above, and not on the particular water right that happened to be at issue.

burden when the issue is an agreement negotiated by the United States in its solemn capacity as trustee for an Indian tribe.

4. Neither *Montana* Nor *Brendale* Purported To Rewrite These Established Rules Of Construction.

Petitioner wholly ignores the foregoing body of precedent, and dismisses as irrelevant this Court's well-established principles requiring clear evidence of congressional abrogation of Indian treaty rights, describing these clear evidence rules as alien to and inconsistent with what Petitioner supposes to be a distinct and controlling line of authority: *Montana v. United States*, 450 U.S. 544 (1981), and *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*, 492 U.S. 408 (1989). See Pet.Br. 35-36 (discussing *United States v. Dion*, 476 U.S. 734 (1986)). To be sure, this Court has "not rigidly interpreted that preference [for an express congressional statement] as a *per se* rule," *Dion*, 476 U.S. at 739, and has looked beyond the face of an act and relied on "'legislative history' and 'surrounding circumstances'" when such evidence of abrogation "is sufficiently compelling." *Id.* But neither *Montana* nor *Brendale* questioned — let alone repudiated — the venerable principles of Indian law statutory construction and treaty interpretation elaborated above.³⁷

Although it never deigns to mention the other pertinent Indian law interpretive doctrines, Petitioner ultimately relents and concedes at least that *Montana* and *Brendale*, like *Dion* (which affirmed the "clear evidence" rule), all involve application of a standard for determining when tribal rights "may be divested." Pet.Br. 36. Yet Petitioner oddly contends that the standard this Court applies for divesting tribal rights to engage in "*nongovernmental activity*" is "*more stringent*" than the standard for abrogating the tribe's "*governmental authority*" itself. Pet.Br. 36 (original emphasis). If

³⁷ See, e.g., *Montana*, 450 U.S. at 567-68 & n.1 (Stevens, J., concurring)(discussing doctrine that ambiguities must be resolved in favor of Indian tribes but finding it insufficient on facts of that case to sustain tribal ownership of riverbed); *id.* at 569, 581 n.18 (Blackmun, J., dissenting in part)(arguing that the Court misapplied doctrine with respect to riverbed issue, but concurring in the Court's resolution of tribal power to regulate hunting and fishing by non-Indian settlers on land they own in fee simple).

any such distinction is to be made, surely Petitioner has it backwards. Because "the Federal Government [is] firmly committed to the goal of promoting tribal self-government, a goal embodied in numerous federal statutes," this Court has "held that tribes have the power to manage the use of their territory and resources by both members and non-members . . . [and] to undertake and regulate economic activity within the reservation." *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 334-35 (1983)(Marshall, J., for a unanimous Court). See *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143-44 (1980)("Ambiguities . . . have been construed generously in order to comport with these traditional notions of [Indian] sovereignty and the federal policy of encouraging tribal independence"). Although in some cases that goal and those tribal powers may be abrogated by operation of a countervailing statutory policy, nothing in *Montana* or *Brendale* — or in any other authority offered by Petitioner — requires that the judicial determination of whether tribal treaty rights have been divested be made without reference to the principles of interpretation that have guided this Court's Indian law jurisprudence for 150 years. We now turn to the application of those settled principles to the facts of this case.

D. NO FEDERAL STATUTE OR TREATY DIVESTS THE TRIBE OF POWER TO LICENSE HUNTING AND FISHING ON THOSE PORTIONS OF THE FLOOD CONTROL AREA THAT LIE WITHIN THE RESERVATION.

1. The Flood Control Act of 1944 Did Not Divest the Tribe of Licensing Power.

The courts below were unanimous that neither the text of the Flood Control Act nor its legislative history even mentions tribal jurisdiction or tribal regulatory authority. (JA 134-35; A28-30 & n.15). The Eighth Circuit has twice considered the Flood Control Act and twice concluded that "there is simply no indication in the legislative history that Congress even considered Indian rights when it adopted Section 4." (A30); *Lower Brule Sioux Tribe v. South Dakota*, 711 F.2d 809, 825 n.23 (8th Cir. 1983), *cert. denied*, 464 U.S. 1042 (1984). The Act certainly does not satisfy the requirement of a clear expression of congressional intent to limit tribal sovereignty or to abrogate treaty rights. Therefore, the Act's

silence can only mean that tribal authority remained unaffected by the Flood Control Act. (A29-30).

Indeed, insofar as Congress considered Indian tribal rights in enacting the Flood Control Act, Congress made clear its intention to *preserve* those rights. (A29 n.15). To the extent that the Flood Control Act's twin purposes — irrigation and flood control — touched upon Indian rights, Section 9(c) preserved the *status quo ante*: "irrigation of Indian trust and tribal lands, and repayment therefor, *shall be in accordance with the laws relating to Indian lands.*" Flood Control Act of 1944, Pub.L.No. 534, Section 9(c), 58 Stat. 891 (emphasis added).³⁸

Petitioner nevertheless contends that Section 4 of the Flood Control Act necessarily stripped the Tribe of licensing authority, because Section 4 directed that the "water areas of all such reservoirs shall be open to public use generally . . . [for] recreational purposes . . . when such use is determined by the Secretary of War not to be contrary to the public interest, all under such rules and regulations as the Secretary of War may deem necessary." (A186).

This section, however, does not even purport to address Indian civil regulatory authority. Nor is the purpose of Section 4 inconsistent with tribal regulation. Even Petitioner must agree that fishing and hunting depend on regulation and conservation for their continued viability. *Cf. Puyallup Tribe v. Department of Game of the State of Washington*, 414 U.S. 44, 49 (1973); *Baldwin v. Fish and Game Commission of Montana*, 436 U.S. 371 (1978). It is inconceivable that Congress intended to strip those tribes which have hunting and fishing rights along the Missouri River of the regulatory authority necessary to maintain those very rights through

³⁸ Likewise, Congress was told during pre-enactment hearings by the Corps of Engineers that tribal lands could not be acquired without satisfying the tribal council consent provisions in the IRA, 25 U.S.C. § 476, yet did nothing to override the IRA requirements. *United States v. 2,005.32 Acres of Land*, 160 F. Supp. 193, 197-98 (D.S.D. 1958) (quoting at length from Chief of Engineers' letter and finding that "this letter indicates that Congress recognized the special situation regarding the Indians and desired that some mutually agreeable plan be worked out"). Congress was thus clearly aware that the IRA imposed limitations on the Flood Control Act's operation and chose not to disturb settled Indian rights. *Id.* at 198. See also *United States v. Winnebago Tribe of Nebraska*, 542 F.2d 1002, 1005-06 (8th Cir. 1976) (holding that Flood Control Act did not authorize the condemnation of Indian lands absent the tribal consent required by treaty).

this oblique passage in Section 4 and without any direct examination of the issue.

Section 4 implicitly recognizes this uncontroversial precept by authorizing public use *only* "when such use" is conducted pursuant to "such rules and regulations as the Secretary of War may deem necessary." The Department of the Army's regulations not only *allow* for tribal regulation of hunting and fishing,³⁹ they *affirmatively establish* the primacy of tribal treaty rights over both public use rights and state and federal regulatory interests.⁴⁰

Section 4 also provides that "[n]o use [of Flood Control reservoirs] shall be permitted which is inconsistent with the laws for the protection of fish and game of the State in which such area is located." (A186). In *Lower Brule Sioux Tribe v. South Dakota*, the Eighth Circuit held that this language was not sufficiently directed at tribal rights to authorize state jurisdiction over tribal members on

³⁹ The regulations provide that: "Hunting, fishing and trapping are permitted except in areas where prohibited by the District Engineer. All Federal, state and local laws governing these activities apply on project lands and waters, as regulated by authorized enforcement officials." 36 C.F.R. § 327.8 (emphasis added). Furthermore, "state and local laws and ordinances shall apply on project lands and waters. This includes, but is not limited to, state and local laws and ordinances governing: . . . (b) Hunting, fishing and trapping. . . . These state and local laws and ordinances are enforced by those state and local enforcement agencies established and authorized for that purpose." 36 C.F.R. § 327.26 (emphasis added). Application of tribal law as one form of local law is no more inconsistent with those regulations and the Flood Control Act than regulation by any other government entity. The Tribe's laws fit the definition of "local law." *Talton v. Mayes*, 163 U.S. 376, 383-84 (1896) (tribal powers of government are local power); *United States v. Bald Eagle*, 849 F.2d 361 (8th Cir. 1988) (tribal law considered local "state" law for purposes of Assimilative Crimes Act, 18 U.S.C. § 13); *United States v. Big Eagle*, 881 F.2d 539 (8th Cir. 1989) (Violations of tribal hunting and fishing ordinances on the taken areas along the Missouri River are subject to prosecution under the federal Lacey Act, 16 U.S.C. § 3372); BLACK'S LAW DICTIONARY 939 (6th ed. 1990) ("local law is one which relates or operates over a particular locality instead of over the whole territory of the state"); *Gallo v. Brown*, 446 F. Supp. 45, 47 (D.R.I. 1978); 18 U.S.C. § 1152 ("local law of the tribe").

⁴⁰ Corps of Engineers regulations provide that such tribal rights confirmed by treaty supersede the Corps' regulatory interests. 36 C.F.R. § 327.1(f) ("regulations . . . apply to those lands and waters which are subject to treaties and Federal laws and regulations concerning the rights of Indian Nations and which lands and waters are incorporated . . . within water resource development projects administered by the Chief of Engineers, *to the extent that the regulations . . . are not inconsistent with such treaties and Federal laws and regulations*") (emphasis added).

the taken area, and petitioner is collaterally estopped from asserting the contrary. 711 F.2d at 825-827 & n.23. The Eighth Circuit's holding in this case was simply the logical corollary of that ruling: if Section 4 is not directed to tribal rights, it cannot divest tribal authority previously confirmed by statute. (A29-30).

The language in Section 4 (A186) on which Petitioner relies to strip the Tribe of its congressionally affirmed licensing power is, as the Court of Appeals held, nothing more than an anti-preemption clause that protects state conservation laws. (A28-29); *Lower Brule*, 711 F.2d at 825 n.23. Congress did not intend to disrupt state conservation efforts by preempting their force through the Flood Control Act, and it said so. This Court has often recognized that anti-preemption clauses must be read narrowly and with care, *see, e.g., California Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, 295-96 (1987) (Scalia, J., concurring), and it is beyond cavil that Section 4 "does not remotely purport," *id.* at 296, to be an affirmative transfer of regulatory authority from tribes to states.⁴¹

2. The Cheyenne River Act of 1954 Did Not Divest the Tribe of Licensing Power.

The Court of Appeals and the District Court agreed that the Cheyenne River Act and its legislative history are silent concerning the issue of tribal licensing and regulatory authority over hunting and fishing on the taken portion of the Reservation. (A37-39; JA 127-130).⁴² Settled rules of construction applicable both to tribal-federal contracts and to Indian law statutes direct the Court to the

⁴¹ Arguably, this language allows states to promulgate conservation-oriented limits and licensing regulations with which non-Indians would have to comply, tribal regulation notwithstanding. In other words, a state may, *arguendo*, be able to set catch limits or other ceilings beyond which tribes could not authorize more permissive uses. However, the question of South Dakota's regulatory authority is not before this Court. *See* pages 19-20, *supra*.

⁴² Even Petitioner's *amici* concede that "[a]t no place in the statutory language or in the legislative history of the [Cheyenne River Act or the Act of 1950] is there an explicit assertion that Congress intended to divest respondent tribe of regulatory authority over nonmembers on the taken area." Brief *Amicus Curiae* of the Int'l Ass'n of Fish and Wildlife Agencies at 24. The several states which appear as *amici* likewise eschew any attempt to argue that the Cheyenne River Act abrogated tribal licensing and regulatory rights. *See* Brief *Amici Curiae* of the States of Montana, *et al.*

conclusion that the Cheyenne River Act preserved the Tribe's pre-existing rights. *See* pages 27-30, *supra*. "[L]egislative repeals by implication will not be recognized, insofar as two statutes are capable of co-existence, 'absent a clearly expressed congressional intention to the contrary.'" *Astoria Federal Savings & Loan Ass'n v. Solimino*, 111 S.Ct. 2166, 2170 (1991). Since the text and history of the Cheyenne River Act do not address this regulatory issue, the Tribe's power must stand unless "a statutory purpose to the contrary is evident." *Id.*

Far from being irreconcilable with the continued existence of the tribal power confirmed by the IRA, the purposes of the Cheyenne River Act support the conclusion that the Tribe retained its licensing power. One purpose of the Act was to provide for the "rehabilitation of the Indians of the Cheyenne River Sioux Reservation," (JA 234), "to the extent that the economic, social, religious, and community life of all said Indians shall be restored to a condition not less advantageous to said Indians than the condition that the said Indians now are in." (JA 239).⁴³ That purpose would clearly be promoted, rather than undermined, by allowing the Tribe to continue developing the remaining economic benefit derived from the taken area after the most fertile lands of the reservation were flooded.

The second purpose of the Act, acquisition of land for federal use (JA 234), is jurisdiction-neutral because, in the absence of express arrangements to the contrary, federal acquisition of territory "shall be conclusively presumed" to have no effect upon the jurisdictional status of the acquired land. 40 U.S.C. § 255. Moreover, no conflict or inconsistency inheres in allowing the Tribe to continue licensing hunting and fishing on the federally taken area within the Reservation, especially given the federal government's role in aiding enforcement of tribal fish and game ordinances under the Lacey Act, 16 U.S.C. § 3372(a)(1). *See* note 22, *supra*. The Cheyenne River Act conveys only "lands which are required by the United States for the reservoir." (JA 235). Extinction of the Tribe's

⁴³ Congress used the term "Indians" in the Cheyenne River Act to refer to the Tribe itself. Thus, for example, the Act conveys only lands "belonging to the Indians." (JA 235). Other portions of the Act carefully distinguish between "members of the Tribe" and the "Tribe" where such distinctions are necessary. (JA 241, 242, 244, 248).

licensing authority was not required by the United States to build the reservoir, nor for the flood control and irrigation uses to which the reservoir was to be put.⁴⁴

Of course, the corollary to the acquisition was Congress' intention to compensate the Tribe completely for its lost interests. See JA 236; 96 Cong.Rec. at 15609 ("to the extent that these rights may be impaired or destroyed, the tribe is entitled to compensation apart from settlement with allottees"). That purpose too would fail if the Court were to rule against the Tribe, because such a ruling would leave the Tribe uncompensated for the loss of a valuable economic resource.

The Cheyenne River Act provided the Tribe no compensation whatever for the revenue stream arising out of the Tribe's licensing authority. This is in sharp contrast with the arrangement made for grazing permit revenue whereby the Tribe specifically sought (and received) compensation for its lost grazing permit revenue brought about by the flooding — in addition to the actual value of the flooded land.⁴⁵ Both parties to the negotiations deemed the loss of the resource *per se*, and the loss of the licensing revenue *derived* from that grazing resource, to be distinct. The fact that the Tribe, the federal negotiators, and Congress did not even consider compensation for the loss of revenue from sales of *hunting and fishing licenses* necessarily supports the view that the Tribe's ability to receive such revenue would, unlike grazing permit revenue, be

⁴⁴ Section 2 of the 1950 Act, which set the framework for the transaction sealed by the Cheyenne River Act, authorized the United States to acquire only those "lands or interests . . . required by the United States for the reservoir." (A188). See also A36-37 n.17. Reading the Cheyenne River Act of 1954 to include a cession of licensing authority by the Tribe would therefore require the conclusion that the United States disregarded the statutory mandate of the 1950 Act.

⁴⁵ Grazing permit revenue lost as a result of the flooding is the *only* economic loss attributable to the Tribe's regulatory activity for which the Tribe was compensated. Grazing revenue was lost not because the Tribe lost licensing power *per se* over grazing rights, but because the *land itself* was lost to flooding. Therefore, the loss of grazing permit revenue is proof not of the Petitioner's claim that the Tribe was generally stripped by the Cheyenne River Act of all licensing power over the taken area, but only of the mundane fact that cows cannot walk — or graze — on water. Indeed, the United States Comptroller has determined that the Tribe has grazing permit authority over all of the taken area. Trial Ex. 277.

unaffected by the Cheyenne River Act and the inundation of portions of the taken area.⁴⁶

Moreover, divesting the Tribe of a valuable economic resource without compensation would be a serious breach by Congress of its duty to compensate the Tribe for taken resources as set forth by this Court in *Shoshone Tribe of Indians*, 299 U.S. at 497, *United States v. Creek Nation*, 295 U.S. 103, 110 (1935), and *Menominee Tribe of Indians v. United States*, 391 U.S. 404, 407, 413 (1968) (recognizing that the United States can be held liable for divesting tribal hunting and fishing rights without payment of compensation). See Joint Senate-House Hearing at 44 (Rep. D'Ewart recognized that the United States might be "liable" in future suits if Congress "set aside" the Tribal Constitution or treaties).⁴⁷

Confronted with two possible constructions, courts are bound to choose the one which assumes that Congress acted properly. For example, in *Menominee Tribe, supra*, the tribe sought compensation for what it claimed was Congress' *sub silentio* divestiture of its tribal hunting and fishing rights through the Menominee Termination Act. The Court noted that the Menominee Termination Act, like the Cheyenne River Act, expressed Congress' intention that the Act settle "all financial obligations" between the Menominee Tribe and the United States and concluded that "[w]e find it difficult to believe that Congress, without explicit statement, would subject the United States to a claim for compensation by destroying property

⁴⁶ Section 2(b)(1) of the 1950 Act provided for the payment of "just compensation for lands and improvements and interests therein conveyed." (A189). Since the Tribe was not compensated for the licensing revenue that Petitioner claims the Tribe has now lost, reading the Cheyenne River Act to include a cession of tribal licensing power would, again, require the conclusion that the United States ignored its obligations under the 1950 Act.

⁴⁷ The fact that other cases such as *Menominee* specifically concerned tribal rights to hunt and fish rather than tribal rights to *license* hunting and fishing is of no consequence. *Menominee* itself deemed hunting and fishing rights to have a regulatory element, insofar as the tribe's right to hunt and fish was held to encompass the right to do so free of regulation by the state. See 391 U.S. at 406-07. Furthermore, the Court's opinion in that case reveals that Indian hunting and fishing rights are often of a piece with Indian rights to license those activities on the reservation. *Id.* at 410-11 (discussing Pub.L. No. 280, which preserves "any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing, or regulation thereof.") (emphasis added).

rights conferred by treaty, particularly when Congress was purporting by the Termination Act to settle the Government's financial obligations toward Indians." 391 U.S. at 413. See also *Leavenworth v. United States*, 92 U.S. 733, 742-43 (1876) ("As the transfer of any part of an Indian reservation secured by treaty would also involve a gross breach of the public faith, the presumption is conclusive that Congress never granted it. . . . [I]f Congress really meant that this grant should include any part of the reservation of the Osages, it would at least have secured an adequate indemnity to them").⁴⁸

Here, that rule leads to the unmistakable conclusion that Congress did not "take" the Tribe's licensing and regulatory authority *sub silentio* without compensation through the Cheyenne River Act, and that the Tribe's rights remain intact.⁴⁹

In 1954 Congress labored in an era when contemporary doctrine favored tribal civil regulatory authority over non-members, regardless of the ownership status of the land within the reservation, unless Congress expressly divested the tribe of that authority.⁵⁰ This was also the prevailing administrative view of Indian law in 1954. See, e.g., *Powers of Indian Tribes*, 55 I.D. 14, 50 (1934) ("on all lands of the reservation, whether owned by the tribe, or members thereof, or by outsiders, the tribe has the sovereign power of determining the conditions upon which persons shall be permitted to enter its domain, to reside therein, and to do business"). As stated in Felix Cohen's landmark treatise on Indian law, published

⁴⁸ Section 2(e) of the 1950 Act provides that the ultimate arrangement between the Tribe and the United States would "final[ly] and complete[ly] settle[] . . . all claims" by the Tribe "arising because of construction of the Oahe project." (A191). Reading the Cheyenne River Act to divest the Tribe of licensing rights could well subject the United States to a claim for an uncompensated taking, thereby undermining the purpose of the 1950 Act and, once again, dictating the conclusion that the United States failed to fulfill the congressional mandate.

⁴⁹ Considering the negotiating position in which the Tribe found itself -- forced by Congress to sell and left only with the limited ability to justify as high a price as possible -- the Tribe had every incentive to identify lost hunting and fishing permit revenue as a basis for additional compensation. The fact that the Tribe never did so is strong evidence that the Tribe did not intend to forfeit those rights.

⁵⁰ This doctrine was of ancient lineage. See, e.g., *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 557 (1832) ("All these Acts . . . manifestly consider the several Indian nations as distinct political communities, having territorial boundaries, within which their authority is exclusive").

by the Department of the Interior in 1942, "[t]he statutes of Congress, then, must be examined to determine the limitations of tribal sovereignty rather than to determine its sources or its positive content. *What is not expressly limited remains within the domain of tribal sovereignty.*" F. Cohen, *HANDBOOK OF FEDERAL INDIAN LAW* 122 (1942)(emphasis added).

The possibility that those "platonic notions of Indian sovereignty" may have since fallen into some disfavor, *County of Yakima v. Yakima Indian Nation*, 112 S.Ct. 683, 687-688 (1992), is irrelevant to the statutory analysis in this case. What is determinative is the fact that those notions formed *the backdrop against which Congress enacted the Cheyenne River Act*: Congress was constantly informed, by those it relied upon for expertise in the area of Indian law, that tribal regulatory authority would continue absent express divestiture, and while not necessarily conclusive on the issue, this "commonly shared presumption" of the various branches of the federal government "carries considerable weight." *Oliphant v. Suquamish Tribe*, 435 U.S. 191, 206 (1978). Indian laws and treaties "cannot be interpreted in isolation but must be read in light of the common notions of the day and the assumptions of those who drafted them." *Id.* In this context, congressional silence creates the presumption that pre-existing and previously confirmed tribal licensing authority over non-Indians within the reservation would continue. *Green v. Bock Laundry Machinery Company*, 490 U.S. 504, 521 (1989).

Indeed, to the extent the legislative history even obliquely addresses the issue, it supports the conclusion that the Tribe retained licensing power. During the hearings on the Cheyenne River Act, the Tribe's attorney described the Tribe's hunting and fishing rights on the taken area in relation to Section X of the Act:

Now, the right to hunt and fish is a tribal right. It is still preserved and is still holding. *No white citizen of South Dakota can go on this reservation and hunt unless he has first obtained a license from the Tribal Council.* Our right to continue hunting and fishing is to us an extremely valid and valuable right.

(JA 214)(emphasis added).⁵¹ That statement must be read to demonstrate the Tribe's understanding that its licensing authority would continue alongside the Tribe's hunting and fishing rights after the Cheyenne River Act — an understanding that would control this Court's interpretation of the Cheyenne River Act, *see Washington State Commercial*, 443 U.S. at 676 (agreement must be understood in the sense it would naturally be understood by the Indians).

Moreover, the conclusion that the Tribe retained its licensing authority over the taken area is consistent with Section X's express — and unusual — reservation of all hunting and fishing rights held by the "Tribal Council and members of said Indian Tribe." (JA 244)(emphasis added). Since the Tribal Council consists entirely of members of the Tribe, the explicit reference to the Tribal Council would be meaningless surplusage unless this section is read to preserve something more than a mere individual right to hunt and fish. *Cf. United States v. Nordic Village, Inc.*, 112 S.Ct. 1011, 1015 (1992)("a statute must, if possible, be construed in such fashion that every word used has some operative effect."). The Tribe submits that Section X should therefore be read to *reserve* not only tribal members' right to fish and hunt on the taken area, but also the Tribal Council's right to license hunting and fishing on those lands (subject to regulations governing hunting and fishing by other citizens). *Cf. Menominee*, discussed *supra*, note 47.

At a minimum, this testimony put Congress on notice of the Tribe's valuable licensing right, triggering a duty to identify that right as among the taken rights and to compensate the Tribe accordingly. *See Central States v. Central States Transport, Inc.*, 472 U.S. 559, 572 (1985) (describing trustee's duty to the beneficiary when purchasing trust property to "determine exactly what property forms the subject-matter of the trust [and] who are the beneficiaries"); *Washington State Commercial*, 443 U.S. at 675-676 (1979) ("the United States, as the party with the presumptively

⁵¹ The District Court said the word "Now" in the this testimony indicated that the Tribe's attorney was describing the state of affairs *prior* to the Cheyenne River Act. Thus, the District Court reasoned, the tribal attorney could not have been describing the effects of the Cheyenne River Act, even though his statements are entirely consistent with the effects of the Act. (JA 128-29). Now, this is a remarkable piece of legerdemain, for even a glance at the interchanges during the hearings reveals that both the Tribe's attorney and Representative Berry used the word "now" as a meaningless conversational preface to their statements. (JA 211, 213).

superior negotiating skills . . . has a responsibility to avoid taking advantage of the [Indian] side"). *See also* pages 27-28, *supra*.

Despite the contrary findings of both courts below, Petitioner claims to find "clear language of abrogation in the text" of the Cheyenne River Act. Pet.Br. 40. *See id.* at 37-39. Yet Petitioner points to no textual abrogation of tribal licensing power, and instead offers only an argument based on the structure of the Cheyenne River Act. Petitioner juxtaposes Section I of the Cheyenne River Act, which transfers certain proprietary interests in the land itself to the United States, with Section X, which reserves hunting and fishing rights to the Tribe. From this juxtaposition, Petitioner argues that the absence of any express reservation of further rights precludes the conclusion that the Tribe is left with anything other than the enumerated rights.

Petitioner reads far too much into Section I, which merely provides for the acquisition of proprietary interests in the land by the United States, and no more. Even the District Court agreed that the fact that Cheyenne River Act "convey[ed] limited title to lands necessary for the federal project does not positively denote a relinquishment of tribal jurisdiction over those lands." (JA 102).⁵² This dichotomy between proprietary and jurisdictional interests comports with the ordinary presumption applied to federal land purchases — federal acquisition generally has no effect upon the jurisdictional status of the acquired land. 40 U.S.C. § 455.⁵³

This Court rejected a similar argument based on the structure of another Indian-federal agreement in *United States v. Winans*, 198 U.S. 371 (1905). There, the State of Washington argued that a tribe's failure expressly to reserve certain rights, read alongside the tribe's express retention of others, constituted a forfeiture of the unreserved rights in question. This Court rejected that argument,

⁵² Indeed, the District Court held that "the Cheyenne River Act should be construed so as to defend those rights *retained* by the Tribe." (JA 133)(original emphasis). The District Court's error lay in assuming that tribal civil regulatory power is something that must be *expressly delegated* by Congress, rather than something that, once confirmed by a previous treaty or statute, must be *expressly divested* by Congress. *See id.*

⁵³ The limited nature of the Tribe's proprietary relinquishment is also consistent with one Corps of Engineers officer's own conception of the Corps' interest in the taken area. *See* Pet.Br. at 45 ("the Corps has *only proprietorial* jurisdiction over its project lands along the mainstem of the Missouri River")(emphasis added).

stating that the relevant treaty, like the Cheyenne River Act, "was not a grant of rights to the Indians, but a grant from them — a reservation of those not granted." *Id.* at 381.⁵⁴ Under *Winans*, the presumption is not the forfeiture of all unreserved rights, but the retention of all unceded rights. *See also Winters v. United States*, 207 U.S. 564 (1908). *Antoine v. Washington*, 420 U.S. 194, 199-200 (1975).⁵⁵

Petitioner attempts to buttress its structural argument about the Cheyenne River Act by reference to the legislative history of the Act of 1950, which set the framework for the negotiations leading up to the acquisition of the taken area. Petitioner points to the deletion from an early, unenacted version of Section 7 of the 1950 Act of language requiring the "preservation of any treaty rights of the tribe in regard to fishing, hunting, and trapping." Pet.Br. at 40-41. Once again, Petitioner pursues an argument that even the District Court rejected. (JA 137) ("The best that can be said of the Act [of 1950] is that it sought to preserve treaty hunting and fishing rights").

A similar argument was rejected by this Court in *Menominee*, where the tribe objected to the deletion from the Menominee Termination Act of language expressly preserving the tribe's hunting and fishing rights, out of fear that the bill's "silence [on this point] would by implication abolish those hunting and fishing rights." 391 U.S. at 408. This Court refused to treat the earlier deletion of language as a "backhanded way of abrogating" tribal rights. *Id.* at 412. Petitioner's similar attempt to impute to Congress an intent to

⁵⁴ The treaty at issue in *Winans* contained language, substantively identical to language in Section I of the Cheyenne River Act, that ceded "all their right, titles, and interest" in the ceded land to the United States. 198 U.S. at 377. Notwithstanding that language, the Court found that the treaty reserved to the tribe the unenumerated rights to occupy and cross over the ceded land for hunting and fishing purposes.

⁵⁵ In *Winters*, this Court found that a tribal-federal agreement by which two tribes ceded large portions of their reservation preserved the tribes' water rights, even though the cession agreement contained no express reservation of those rights. As noted above, page 29, this Court framed the issue as one of contract interpretation and relied on the dual principles that such agreements must be construed in favor of the Indians and that the United States' and the tribes' joint insistence as to the meaning of the contract should control. Either of those principles is sufficient to mandate the conclusion here that the Tribe retained its licensing authority.

abrogate — on the basis of something Congress *did not say* — deserves the same fate.⁵⁶

Petitioner finally appeals for support to the supposed "administrative interpretation" of the Cheyenne River Act by the Army Corps of Engineers. Pet.Br. 45-47. This avenue is closed, as Petitioner well knows: Petitioner sought a finding of fact from the District Court to the effect that the Corps' "consistent administrative interpretation" favored petitioner, Plaintiff's Proposed Findings of Fact Nos. 208-13, *but the District Court rejected that finding*. Petitioner did not appeal that ruling, and it is not before this Court.⁵⁷

Absent an abrogation clear from the Act's language, legislative history, or purpose, Petitioner's contention reduces to an argument that the Cheyenne River Act repealed the Tribe's authority by silent implication. As this Court recently admonished, "'repeals by implication are not favored'" in the field of Indian law. *County of Yakima*, 112 S.Ct. at 690. Petitioner's argument that the Cheyenne River Act's overall effect supposedly repealed tribal treaty rights confirmed by the IRA resembles the Yakima Nation's argument. The Yakima Nation argued that the IRA policy favoring tribal

⁵⁶ In any event, Petitioner ignores the fact that the sole purpose of the 1950 Act was to authorize and develop the framework for federal-tribal negotiations. *United States v. 2,005.32 Acres of Land*, 160 F. Supp. 193, 200 (D.S.D. 1958). In that context, assuming *arguendo* that an omission can have any meaning at all, this omission can at most be read as a congressional decision not to address the issue of treaty hunting and fishing rights specifically at that preliminary stage of the acquisition process. In any event, the negotiations themselves never addressed the Tribe's pre-existing and previously confirmed licensing authority, which dictates the conclusion that said authority was unaffected.

⁵⁷ It is worth noting that Petitioner cites only informal statements by Corps personnel, the majority of which merely appear to reflect the Corps' overall jurisdiction-neutral attitude towards the land it owns along the Missouri River. The most forceful — and the only relevant — statement of Corps policy with regard to jurisdiction is its formal regulations, which allow for local jurisdiction over hunting and fishing on these areas and provide that tribal treaty rights supersede the Corps' own regulations concerning use of its land. *See* note 40, *supra*. The Corps' interpretation of the Cheyenne River Act at its inception likewise supports the Tribe. In its comments on the Act, attached to the Senate Report on the final version prior to passage, the Corps noted that "[r]elative to wildlife, it should be noted that H.R. 2333 contemplates reservation of fishing and hunting rights by the Indians." S.Rep. No. 2489 at 10. The Corps opposed that reservation of rights and therefore opposed the bill's final form. *Id.* at 12.

sovereignty implicitly repudiated the effects of the General Allotment Act, which was intended to dissolve tribal government. This Court rejected the Yakima Nation's argument for a repeal by implication:

Judges "are not at liberty to pick and choose among congressional enactments, and when two [or more] statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective."

112 S.Ct. at 692 (alteration in original). Here, the Cheyenne River Act can be read consistently with the 1868 Fort Laramie Treaty, with the IRA, and with the pre-existing federal recognition of the Tribe's authority to license non-Indian hunting and fishing on this portion of its territory. *See* Joint Senate-House Hearings at 216 (discussing the relation between the IRA and the Treaty of 1868, the tribal counsel told the Committee, "We have no repeals by implication."); *id.* at 238-41 (Sen. Case, the sponsor, discussing continuing vitality of IRA and Treaty of 1868). As in *County of Yakima*, this Court should not do by implication what Congress did not do expressly.⁵⁸

Finally, the Court should keep in mind that the United States, the only other party to the Cheyenne River transaction, agrees that the Cheyenne River Act did not divest the Tribe of licensing power. This is not an instance like that in *Montana*, where the United States and the Tribe on the one hand, and a state on the other, disagreed over questions of law, such as the application of various doctrines

⁵⁸ When Congress meant to displace or override prior law — including tribal law — in order to effectuate the design of the Cheyenne River Act, it did so expressly. For example, when Congress wished to allow the Tribal Council to distribute tribal lands to Indians displaced by the flood project, it knew that express legislation was necessary to override existing federal and tribal prohibitions on alienation of tribal lands. *See* Fort Laramie Treaty of 1868, Art. 12; 25 U.S.C. § 462; Chey.R.Sx. Const. Art. VIII, § 2. Congress knew that if it wished to abrogate "the Tribal Constitution or Ordinance or Resolution thereunder," it had to do so expressly, and it did so here with respect to compensatory distribution of tribal lands. Pub.L. No. 776, § XI (JA 246). Since Congress obviously examined the Tribe's laws and ordinances carefully, and specifically overrode those that stood in the way of its legislative goals, it is inconceivable that Congress somehow overlooked the tribal licensing provisions which the Secretary of the Interior had approved. Yet, according to Petitioner, those provisions have been silently abrogated in this case.

to the statutes at hand, or the nature and scope of tribal sovereignty. This case involves a different sort of dispute. The District Court formally found — and is it undisputed — that the Tribe exercised licensing power over the taken area both before and after the Cheyenne River Act. That power was confirmed in the Tribe by the IRA in 1934. The question here is whether the Cheyenne River Act, which embodied an agreement between the Tribe and the United States, divested that power. As the only parties to that agreement, the United States and the Tribe have special knowledge pertaining to it, and their joint interpretation of its terms must be deemed conclusive, Petitioner's self-serving, third-party opinion notwithstanding. *See* pages 28-29, *supra*.

II. THIS FEDERALLY RECOGNIZED TRIBAL POWER TO REGULATE HUNTING AND FISHING ON FEDERAL LAND WITHIN THE RESERVATION IS CONSISTENT WITH THE HOLDINGS IN *MONTANA* AND *BRENDALE*.

A. THE HOLDINGS IN *MONTANA* AND *BRENDALE* TURNED ON THE ALIENATION OF TRIBAL LAND UNDER THE ALLOTMENT ACT POLICY OF EXTINGUISHING TRIBAL GOVERNMENT.

Petitioner interprets *Montana* as supplanting all prior precedent relevant to tribal civil authority over non-Indians, and as conflating tribal power flowing from land ownership with tribal power confirmed by treaty, to produce a new rule that "a treaty right to regulate non-Indians can exist, if it exists at all, only on lands over which the tribe has 'absolute and undisturbed use and occupation.'" Pet.Br. 11 (quoting *Montana*, 450 U.S. at 559). Petitioner's error lies in extracting this dictum from the particular factual context of *Montana* and the Allotment Act, and generalizing it to create a new field theory for tribal civil regulatory authority over non-Indians on the reservation.

Indeed, Petitioner's effort to extend the holding in *Montana* to govern the very different circumstances of this case is at odds with this Court's explicit admonition in *Montana* itself:

Though the parties in this case have raised broad questions about the power of the Tribe to regulate hunting and fishing

by non-Indians on the reservation, the regulatory issue before us is a narrow one[:] . . . the power of the Tribe to regulate non-Indian hunting and fishing on reservation land owned in fee by non-members of the Tribe.

Montana, 450 U.S. at 557 (emphasis added). *Brendale* involved the similarly narrow issue of tribal power "to zone fee lands owned by non-members." 492 U.S. at 414. There is no escaping the fact that the land over which a tribe unsuccessfully asserted regulatory power in each case was *private land held in fee simple* by individuals who were not members of the tribe. That fact was repeatedly stressed by this Court in both cases. See, e.g., *Montana*, 450 U.S. at 557, 559 n.9, 561, 563, 564, 565 n.14; *Brendale*, 492 U.S. at 414, 416, 419, 422, 423, 425, 427, 428.

No such land is at issue here. The property on which the Tribe claims power to license hunting and fishing is not private property owned in fee simple by non-Indian individuals, but public property owned by the United States, which was taken by the federal government for the limited purpose of building a dam, with reservation of other rights to the Tribe. Here, as in *Montana* and *Brendale*, "treaty rights with respect to reservation lands must be read in light of the subsequent alienation of those lands." *Montana*, 450 U.S. at 561. See also *Brendale*, 492 U.S. at 422. But in this case both the *mode* of alienation and the underlying statutory *purpose* for that alienation were entirely different from what this Court confronted in those cases.

The land at issue in *Montana* and *Brendale* had been alienated in fee simple to individual non-Indians pursuant to the Allotment Act — a factor this Court deemed decisive. *Brendale*, 492 U.S. at 422-23.⁵⁹ As the Court recently summarized, "[t]he objectives of allotment were simple and clear-cut: to extinguish tribal sovereignty,

⁵⁹ *Montana* also involved regulatory power over a riverbed reserved to the state under the "equal footing" doctrine. 450 U.S. at 550-51. The nature of tribal alienation of the riverbed therefore was not an issue because the riverbed had never been part of the reservation; under the doctrine it had always been reserved for Montana. Furthermore, state ownership of riverbed lands is bound up with state sovereignty concerns, *id.* at 551-52, whereas riverbed lands that were reserved for Indians — such as those here — do not implicate state sovereignty, particularly where the state has disavowed all interest in them. S.D. Const., Art. XXVI, § 18 ("Indian lands shall remain under the absolute jurisdiction and control of the Congress").

erase reservation boundaries, and force the assimilation of Indians into the society at large." *County of Yakima*, 112 S.Ct. at 686. The legislative history and avowed purpose of the Allotment Act made plain that Congress could not have intended that "non-Indians who would settle upon alienated allotted lands would be subject to tribal regulatory authority. Indeed, throughout the congressional debates, allotment of Indian land was consistently equated with the *dissolution of tribal affairs and jurisdiction*." *Montana*, 450 U.S. at 560 n.9 (emphasis added). *Brendale* likewise involved settlers and the use of allotted fee land by individuals to build cabins and other single-family residential dwellings. See 492 U.S. at 417-18. As the plurality explained in *Brendale*:

In *Montana*, as in the present cases, the lands at issue had been alienated under the Allotment Act, and the Court concluded that "[i]t defies common sense to suppose that Congress would intend that non-Indians purchasing allotted lands would become subject to tribal jurisdiction when an avowed purpose of the allotment policy was the ultimate destruction of tribal government." 450 U.S. at 560 n.9.

492 U.S. at 423 (White, J.).

Thus, although there is nothing in the text of the Allotment Act that "explicitly qualifies the Tribe's rights over hunting and fishing," *Montana*, 450 U.S. at 559 n.9, the unambiguous policy of that statute overcame the presumption that tribal authority and rights are unaffected by statutory silence. Cf. *Oregon Dept. of Fish and Wildlife v. Klamath Indian Tribe*, 473 U.S. 753, 773 n.23 (1985) (failure of a statute or treaty expressly to mention cession of tribal rights mandates presumption that such rights continue). The manifest purpose and effect of the Allotment Act "would appear to render [the Tribe's] continued exercise [of the rights at issue] inconsistent" with alienation of land to private non-Indian owners in fee simple. *Id.* at 773. This was no "backhanded" abrogation of tribal authority, because the "statute's 'legislative history' and 'surrounding circumstances,'" *United States v. Dion*, 476 U.S. at 739, manifested the change in status of tribal power. Pre-existing tribal regulatory power simply could not "co-exist" with the Allotment Act's alienation of tribal land in fee simple to non-Indians. Cf. *County of Yakima*, 112 S.Ct. at 692; *Astoria Federal Savings & Loan Ass'n v. Solimino*, 111 S.Ct. 2166, 2170 (1991).

The "subsequent alienation" of land at issue in this case is entirely different. This was not a breaking-up and selling-off of reservation lands to individual non-Indians under the Allotment Act, but the purchase by the United States of certain property interests for the construction of the Oahe Reservoir pursuant to the Cheyenne River Act. As explained above, pages 35-36, the purposes of that act were to acquire Tribal land to the extent necessary for the reservoir and to rehabilitate the Cheyenne River Sioux Tribe so as to minimize the effect on it of the flood control project.⁶⁰ The United States took only what it needed for its reservoir; many tribal rights were expressly reserved. There was no diminution of the Reservation's boundaries, let alone any attempt to break it up and sell it off to non-Indians.

The tribal regulatory power struck down in *Montana* fell on hunting and fishing by non-Indians on their own individual, private property — land alienated in fee pursuant a law enacted to extinguish tribal regulatory power. But this case involves no settlers or homesteaders. The regulation of non-Indian hunting and fishing here falls on transient sportsmen, temporary invitees on federal property within the Cheyenne River Sioux Reservation. Cf. *Montana*, 450 U.S. at 562 (distinguishing between fee land owned by non-Indians and property "held or controlled by Indians or the United States"). In contrast to *Montana* and *Brendale*, in this case there is nothing about tribal power to license hunting and fishing (including the possibility of federal enforcement under the Lacey Act) that is irreconcilable with ownership of the taken area by the

⁶⁰ Petitioner's attempt to conjure a congressional design to destroy tribal government by linking the Cheyenne River Act to termination legislation is risible. Pet.Br. 31-33. This contention cannot be squared with the Act's history, with its purpose of rehabilitating the Tribe, Section I, or with its enhancement of the Tribal Council's authority by delegation to that body of various powers, including control of the large fund appropriated to restore the Tribe's economic, social, and community life. Section V (JA 239). Petitioner's citations to the legislative history merely demonstrate a congressional desire that the Act diminish the Tribe's dependence upon the federal government, not a congressional plan to diminish tribal self-government. Finally, Petitioner is mistaken in assuming that enactment of a bill during the so-called "termination era" stamps that law with a congressional purpose to strip tribes of power to license hunting and fishing within their reservations. In 1954, Congress enacted Public Law 280, 18 U.S.C. § 1162(c), which preserves pre-existing tribal rights relating to "the control, licensing, or regulation" of hunting and fishing. See *Menominee*, 391 U.S. at 410-11.

United States. The power to regulate hunting and fishing by non-Indians that was recognized by the Indian Reorganization Act can easily co-exist with the flood control and tribal rehabilitative policies of the Cheyenne River Act.

B. EVEN IF *MONTANA* WERE EXTENDED TO GOVERN THIS CASE, TRIBAL REGULATION SHOULD BE SUSTAINED UNDER THE SECOND EXCEPTION ENUMERATED IN *MONTANA*.

Assuming *arguendo* that *Montana* governs tribal licensing power over the taken area, this case should be remanded to the Eighth Circuit for the initial determination of whether the non-Indian conduct the Tribe would regulate threatens the "political integrity, economic security, or health or welfare of the tribe." *Montana*, 450 U.S. at 566. As Petitioner points out, Pet.Br. 8 n.3, the Court of Appeals had no occasion to decide whether the District Court misapplied this legal standard, or whether its findings were clearly erroneous, although both the Tribe and the United States raised these points below. Tribe's Opening Br. at 10; Tribe's Reply Br. at 23-26; Brief *Amicus Curiae* of the United States at 16-18. Instead, the Eighth Circuit remanded to the District Court for new findings to re-assess the *Montana* factors with respect to the relationship in the taken area between the 104,000 acres of former tribal trust land and the 18,000 acres of once-alienated land. (A46 & n.20).

This additional layer of complexity, and the uncertain status of the District Court's findings on this issue, counsel special attention to the rule against this Court addressing in the first instance an issue that, the parties agree, was not reached by the court below. *Carden v. Arkoma Associates*, 494 U.S. 185, 197 (1990); *IBEW v. Hechler*, 481 U.S. 851, 865 (1987).

CONCLUSION

The judgment below should be affirmed.

Respectfully submitted,

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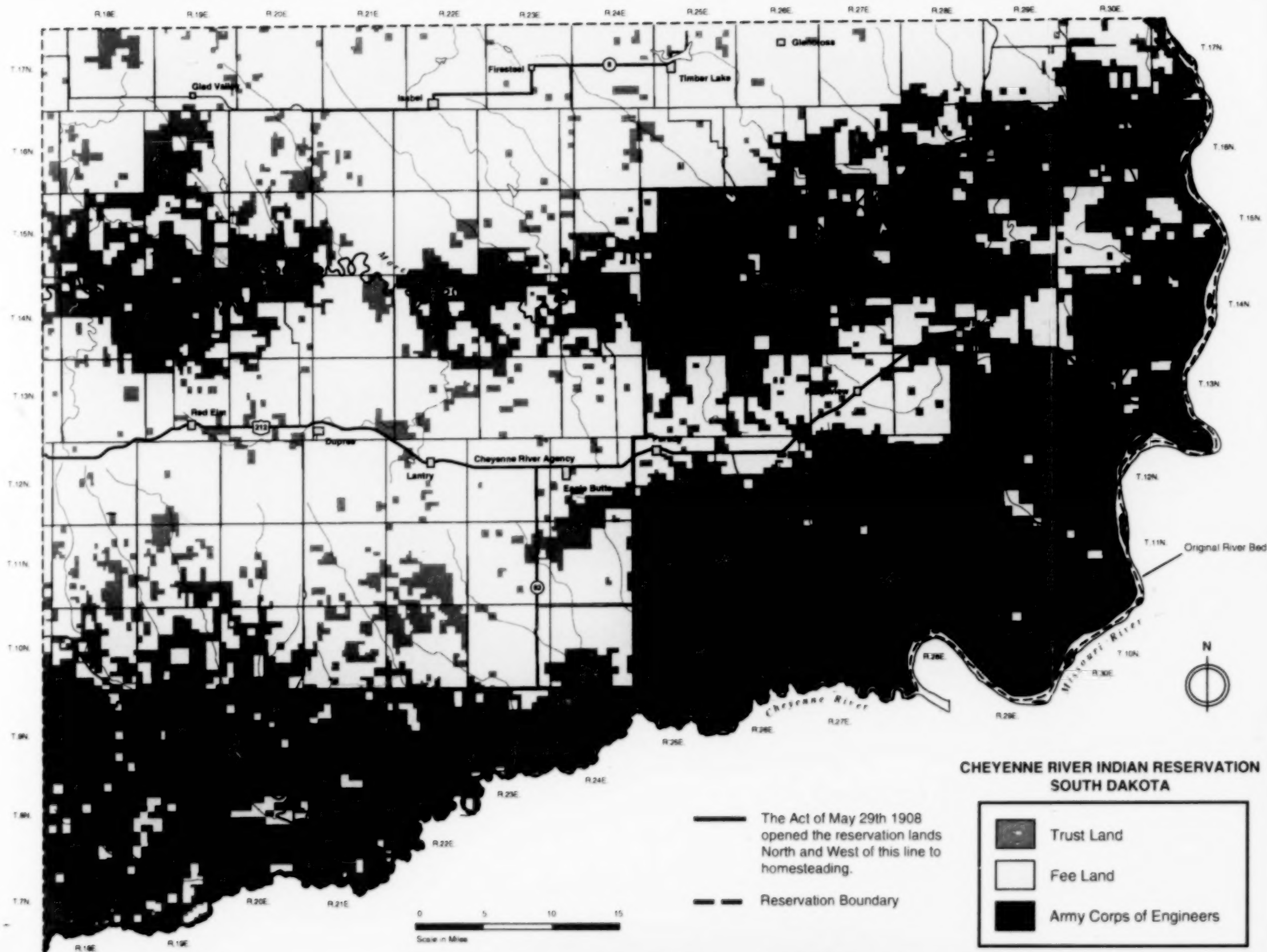
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No. 91-2051

Supreme Court, U.S.
FILED

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In The
Supreme Court of the United States
October Term, 1991

STATE OF SOUTH DAKOTA IN ITS OWN
BEHALF, AND AS PARENS PATRIAE,

Petitioner,

v.

GREGG BOURLAND, PERSONALLY AND AS
CHAIRMAN OF THE CHEYENNE RIVER SIOUX
TRIBE AND DENNIS ROUSSEAU, PERSONALLY AND
AS DIRECTOR OF CHEYENNE RIVER SIOUX TRIBE
GAME, FISH AND PARKS,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit

REPLY BRIEF ON MERITS

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Supreme Court Rule 14.1(a) 2

INTRODUCTION

This brief addresses arguments made by the Tribe and the United States on the merits.¹ Many of the points made in the first thirty pages of the tribal brief are inaccurate or misleading, and appear to be designed to direct the attention of the Court from the legal issues before it.² Other points are simply irrelevant, or do not need to be addressed at all.

It is necessary, however, to address the argument of the Tribe that this case puts at issue only its power to license and not its power to *enforce* licensing. RB 17. The argument is without merit. The district court, *see* DCO JA 141-142, the court of appeals and indeed all of the parties until the filing of the Tribe's latest brief, have understood the State's argument to be that the Tribe could not subject a non-Indian to the jurisdiction of the Tribe's courts. Furthermore, the Question

¹ The notations "T" and "PHT" refer to the Trial Transcript and Preliminary Hearing Transcript, respectively. The notations "Ex." and "PH Ex." refer to Trial Exhibits and Preliminary Hearing Exhibits, respectively. In addition, the notation "PTA" followed by a letter or double letters refers to the Petitioner's four-volume Appendix to its Trial Brief below. *See* R 133. The notations "PB," "RB" and "USB" refer to the Petitioner's Brief, the Respondent's Brief and the federal brief on the merits, respectively. The notation "DCO" refers to the District Court Opinion of August 21, 1990. *See* JA 50.

² For example, the Tribe at RB 4 cites Art. 7, § 2 of its Bylaws as authorizing its council to pass hunting and fishing ordinances "not conflicting with any federal or state game laws [and] to cooperate with federal and state conservation efforts. . . ." At RB 13 and 20 n.26 it stresses its cooperation with the state. The Tribe neglects to add that Art. 7, § 2 was amended in a June 23, 1992, election and tribal ordinances *now* need only not conflict "with any of the federal game laws," and cooperation is required only "with federal authorities." (The amendment has been approved by Interior but the election at which this and other amendments were adopted is presently under challenge for, *inter alia*, noncompliance with the bilingual requirements of the Voting Rights Act. *Elk Nation v. Lujan*, Civ. No. 92-3039 (D.S.D.)).

Presented, i.e., whether the Tribe has the authority to "regulate" non-Indians, most certainly "fairly includes" the argument that the Tribe may not undertake the key action *necessary* for it to regulate – to subject the non-Indians to the jurisdiction of tribal courts. *See*, Supreme Court Rule 14.1(a).³

The Tribe also argues that no question as to the "scope of tribal court civil enforcement of hunting and fishing regulations" is at issue. RB 18. This statement is at odds, however, with the Tribe's stipulation to or introduction of regulations setting forth tribal civil fines and forfeiture procedures. *See* Ex. 7 and 8 (T 4); Ex. 13 (T 689, 705). Further, the content of the tribal civil penalty and forfeiture provisions which could be applied upon the federal taken area are at issue. The Tribe correctly argues that it has never "imposed severe or unfair penalties on non-Indian" violators. RB 18, *quoting* JA 19-20. Indeed, the evidence shows that it has never imposed *any penalties* on non-Indians for hunting and fishing violations prior to this litigation. Nonetheless, the *threat* of "draconian",

³ The Tribe in a related argument urges that *United States v. Big Eagle*, 881 F.2d 539 (8th Cir. 1989) held that violations of tribal hunting and fishing ordinances "on the taken areas of the Missouri River are subject to federal prosecution under the Lacey Act . . . without regard to whether the particular tribe itself could undertake enforcement in its own courts." RB 17, *see also* RB 33 n.39. This statement is mistaken as to the taken areas now at issue (and it is notable that the United States does not join in this tribal argument). *Big Eagle* (which involved non-member Indians, not non-Indians) was tied to a state-tribal agreement with the Lower Brule reservation. No such agreement is present here. *Big Eagle*, 881 F.2d at 541-542. The record also demonstrates that *Big Eagle* has *not* been applied by federal prosecutors to areas (including the Cheyenne River taken areas at issue here) other than those involved in the Lower Brule settlement. *See* T 569-570. Finally, the district court's views on *Big Eagle*, DCO JA 138-142, were explicitly labeled "dicta" by the circuit court. *South Dakota v. Bourland*, 949 F.2d 984, 996 (8th Cir. 1991); Pet. App. A-49-A-50. In any event, application of tribal law as a matter of federal Lacey Act law in the taken area at issue here would be problematic given the finding of the district court that the tribe "discriminates against nonmembers." DCO JA 80.

see RB 18, civil penalties and forfeitures make the provisions at issue relevant insofar as they remain within tribal ordinances. These regulations are a statement of intent.⁴

ARGUMENT ON THE MERITS

I. MONTANA AND BRENDAL CONTROL THIS QUESTION.

Montana and *Brendale* hold that the source of tribal power to regulate non-Indians must have its origin either in positive federal law such as treaty or in the inherent sovereignty of the Tribe.

A. The treaty power does not justify the exercise of civil regulatory jurisdiction over the taken area.

In *Montana v. United States*, 450 U.S. 544 (1981), this Court considered treaty language which provided that particular land be set apart for the "*absolute and undisturbed use and occupation* of the Indians herein named. . . ." *Montana v. United States*, 450 U.S. at 558, *quoting* 15 Stat. 649 (emphasis in original). That treaty also provided that the United States agreed that no persons except those authorized by the treaty should be permitted to "pass over, settle upon, or reside in the territory. . . ." *Id.* According to *Montana*, this treaty language had the effect of "arguably"⁵ conferring "upon the Tribe the authority to control fishing and hunting on those lands." *Montana*, 450 U.S. 458-459. This Court held, critically:

⁴ The Eighth Circuit Court of Appeals did opine on the Tribe's power to discriminate against non-Indians, *Bourland*, 949 F.2d at 995, Pet. App. A-42-A-43, and it is thus incorrect to allege that this question is not at issue here. *See also*, for the State's comment on the concurrent jurisdiction issue, PB 28 n.21 and accompanying text.

⁵ The State agrees with the State Amici that this treaty language does *not*, in fact, confer regulatory authority over non-Indians. *See*, Brief of Amici Curiae Montana, et al., p. 5-8. Such a claim is inconsistent with the purpose of the treaty to exclude; it also confuses the treaty granted property or landowner power with tribal sovereignty principles.

But that authority could only extend to land on which the Tribe exercises "absolute and undisturbed use and occupation."

450 U.S. at 559.

The unavoidable conclusion of *Montana* is that if the Tribe cannot exercise "absolute and undisturbed use and occupation" on particular lands, it no longer has the "arguable" authority to regulate hunting and fishing on those lands.

1. *Montana* means what it says.

The central argument of the United States and of the Tribe is that *Montana* does not mean what it says.⁶ Both arguments focus on the meaning of footnote 9 and the motives underlying the Allotment Act. See *Montana*, 450 U.S. at 559 n.9; see USB 19, 20, 21; RB 46-47. Footnote 9, read in context, was apparently intended only to repudiate the argument of the lower court that the legislative history and motives underlying the Allotment Act somehow allowed the Tribe to exercise regulatory rights over non-Indians on allotted lands despite the fact that the Tribe no longer held "absolute and undisturbed use and occupation" of the lands. The footnote did not displace the square holding of *Montana* regarding "absolute and undisturbed use" and the consequences of the loss of such "absolute and undisturbed use."

⁶ The cases relied upon by the Tribe and the United States do not undermine *Montana* and *Brendale*. Neither *Menominee Tribe v. United States*, 391 U.S. 404 (1968), nor *Washington v. Washington State Commercial Passenger Fishing Vessel Assn.*, 443 U.S. 658 (1979), even addresses the issue now before the Court: tribal jurisdiction over non-Indians. Further, the holding of *Iowa Mutual Insurance Company v. LaPlante*, 480 U.S. 9 (1987), is simply that the tribal court should ordinarily be given the first chance to resolve challenges to its jurisdiction when a case has been brought before it. See, *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*, 492 U.S. 408, 427 n.10 (1989) (White, J.). *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 330-331 (1983) distinguishes itself from *Montana* stating: "Unlike this case, *Montana* concerned lands located within the reservation but not owned by the Tribe or its members."

This interpretation of footnote 9 is supported by the last paragraph of the footnote itself which indicates that policy underlying the sale of land was not decisive. It states "what is relevant . . . is the effect of the land alienation occasioned by that policy on Indian treaty rights tied to Indian use and occupation of reservation land." *Montana*, 450 U.S. at 559 n.9. (Emphasis added.)

Further, the lack of linkage between the motives underlying the Allotment Act and the loss of tribal jurisdiction is clear from the *Montana* treatment of the Big Horn River. In *Montana*, the Court relied upon the equal footing doctrine and not the General Allotment Act to determine the Tribe did not own the bed of the Big Horn River. Nonetheless, although this river ran through the heart of the reservation, the Court assuredly rejected the "Tribe's contention that it was entitled to regulate fishing and duck hunting in the river based upon a purported ownership interest." *Brendale*, 492 U.S. at 443 (Stevens, J.). This was so even though the doctrine relied upon to reject the Tribe's claim of ownership, the equal footing doctrine, did not have destruction of tribal government as an important objective. Thus, *Montana* itself repudiates the thesis that its jurisdictional doctrine applies only in the context of a General Allotment Act case.⁷

2. The *Brendale* plurality confirms the *Montana* treaty analysis.

The *Brendale* plurality first cites the treaty with the Yakimas which provides that certain lands were set apart "for the exclusive use and benefit" of the Tribe. *Brendale*, 492

⁷ To the extent that motives are important, it is noted that just as the framers of the Allotment Act looked to the ultimate termination of tribal government, so did Congress, the Tribe and the BIA perceive that the termination of the Cheyenne River Sioux tribal government could easily come within 10 or 15 years of the taking legislation at issue here. PB 31-33. In fact, the congressional payments for the taking were intended to place the Indians "in shape" for termination of federal supervision. 100 Cong. Rec. 13,160 (Aug. 3, 1954), JA 226, PTA PP.

U.S. at 422. The Tribe contended that its treaty power to exclude provided authority over the land. The plurality rejected the argument:

We disagree. The Yakima Nation no longer retains the "exclusive use and benefit" of all the land within the reservation. . . .

492 U.S. at 422. The plurality does, of course, cite the General Allotment Act language of *Montana*, but continues to decisively characterize *Montana* as rejecting a treaty based power to regulate in the absence of a power to exclude. According to the *Brendale* plurality, the *Montana* court

flatly rejected the existence of a power, derived from the power to exclude, to regulate activities on lands from which tribes can no longer exclude nonmembers.

492 U.S. at 424. The essence of *Montana* and *Brendale* is that a treaty power to regulate is grounded in the power to exclude. When that power to exclude is lost, so is any lesser included power to regulate. Because it is clear under § 4 of the Flood Control Act of 1944 and § X of the 1954 Cheyenne River Act, that the Tribe can no longer exclude nonmembers from the taken area,⁸ see, PB 22-23, it follows, under *Montana* and the *Brendale* plurality, that any treaty power the Tribe might have previously had to regulate non-Indians within the area has been lost.

⁸ The United States, consistent with the ruling of the Court of Appeals, *Bourland*, 949 F.2d at 995, Pet. App. A-42, concedes that the Tribe is not free to entirely exclude non-Indians from the taken area. See also *Lower Brule Sioux Tribe v. South Dakota*, 711 F.2d 809, 826 (8th Cir. 1983). The Tribe in its Opposition to Petition for Writ of Certiorari, p. 19, admitted that its rights to "exclude" had been modified. Earlier, the tribal president testified that the Tribe could open the federal taken area to tribal hunting and fishing and close it to non-Indians. T 549-550.

B. Inherent sovereign powers.

The inherent sovereignty of the Tribe is also a theoretical basis for the assertion of tribal regulatory power. The *Brendale* plurality, 492 U.S. at 427, quoting *United States v. Wheeler*, 435 U.S. 313, 326 (1978), defines the Tribe's external relations to be the " 'relations between an Indian tribe and nonmembers of the Tribe,' " and finds that "tribal sovereignty over such matters of 'external relations' is divested." No legitimate claim may therefore be made, consistent with the *Brendale* plurality, and *Montana*, 450 U.S. at 564, that the inherent sovereignty of the Tribe justifies the exercise of jurisdiction over non-Indians.

1. The federal attempt to redefine the term "external relations"

Given this conceptual difficulty, the United States seeks to redefine the term "external relations" so as to be more malleable. USB 26. This attempt should be rejected. According to the current federal position, the Tribe's "external relations" are implicated if the nonmember has a "reasonable expectation" that he would not be subject to tribal jurisdiction. USB 26. The United States then argues that the relationship between the Tribe and "transient hunters and fishers" is not one of "external" but is one of "internal" relations, see USB 27, apparently because the nonmembers, as mere transient hunters and fishers, should "reasonably expect," they would be subject to tribal jurisdiction.

But given South Dakota's development of a nationally known fishery, DCO JA 78, nonmembers residing on the Cheyenne River Reservation surely do hunt and fish in the taken area. See Ex. 101, p. 15. (Approximately 19% of all South Dakota resident fishing licenses are sold in counties adjacent to the Missouri River reservoirs). Moreover, any American citizen is entitled to a "reasonable expectation" that his activities on federal lands and waters will not be subjected to the jurisdiction of a nondemocratic system whose courts are "often 'subordinate to the political branches of tribal governments' " and whose "legal methods may depend on

'unspoken practices and norms.' " *Duro v. Reina*, 495 U.S. 676, 693 (1990).

Finally, notwithstanding the argument of the United States, USB 26, it is inconsistent with the Tribe's status to allow it jurisdiction over non-Indians on the federal taken area. See, *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 204, 208 (1978). In the words of the Tribe, these lands were acquired "not to benefit the Tribe but for the United States' own reservoir project. . . ." RB 28. (Emphasis added.)

2. The protection of tribal self-government and the welfare of the Tribe do not justify tribal jurisdiction in this case.

In any event, even if the inherent sovereignty of the Tribe might, in some cases, justify tribal jurisdiction on the basis of harm to self-government, internal relations or welfare of the Tribe, see *Montana*, 450 U.S. at 564-565, that is not the case here. As the district court held, the Tribe

need not regulate the hunting and fishing activities of nonmembers on the taking area . . . to protect its political integrity, economic security, or health or welfare.

DCO JA 81-82. See also DCO JA 148-149.⁹ These findings also dispose of any related claim that the *Montana* "second exception" could apply here to give rise to tribal jurisdiction. See *Montana*, 450 U.S. at 566. (The *Brendale* plurality found that the *Montana* "second exception" factors could constitute a "protectible interest" giving rise to a cause of action only in federal and state, and not tribal, forums. *Brendale*, 492 U.S. at 430-31 (White, J.). See *County of Yakima v. Yakima Indian*

⁹ The court also found that the "taken area and fee lands are not substantial food sources for tribal members," DCO JA 70, that "[t]ribal regulation of nonmember fishing on the shoreline of the taken area is not necessary to protect fishing by tribal members for subsistence purposes," DCO JA 70, and that "[t]ribal regulation of nonmember hunting on the taken area . . . is not necessary to protect hunting by tribal members for subsistence purposes." DCO JA 68.

Nation, 112 S.Ct. 683, 692 (1992), citing the *Brendale* plurality's concept of "protectible interest.")¹⁰

II. ASSUMING APPLICATION OF UNITED STATES V. DION AND SIMILAR CASES, THE RESULT IS THAT THE TRIBE MAY NOT EXERCISE CIVIL REGULATORY JURISDICTION OVER NON-INDIANS ON THE TAKEN AREA.

The court of appeals below and the United States here rely upon *United States v. Dion*, 476 U.S. 734 (1986) as the linchpin of their legal analysis even though *Montana* and the *Brendale* plurality provide the appropriate rule. See PB 35-37.

In any event, *Dion* supports the State's position. *Dion* considered a statute which forbade the taking of eagles generally but which authorized the Secretary of the Interior to permit the taking of eagles "for the religious purposes of Indian tribes." 476 U.S. at 740. This Court found that the exception to the Act allowing the Secretary of the Interior to permit the taking of eagles for religious purposes, along with the legislative history of the Act, constituted "clear evidence" that Congress considered the conflict between the treaty right to hunt eagles and its intended action and resolved the issue against the Tribe. *Dion*, 476 U.S. at 740.

A. The plain language of the 1954 Taking Act, read in context, leaves the Tribe with access only, not jurisdiction over non-Indians on the taken area.

The same follows here from the plain language of Section X of the 1954 Cheyenne River Taking Act, Pub. L. No. 776, 68 Stat. 1191 (1954), Pet. App. A-205, JA 243-244, which provides:

¹⁰ The federal and tribal attempt to read *Yakima* as justifying a broad view of tribal jurisdiction is unavailing given its reference to the "very narrow powers reserved to tribes over the conduct of non-Indians within their reservations." *Yakima*, 112 S.Ct. at 692.

The said Tribal Council and the members of said Indian Tribe shall have, without cost, the right of free access to the shoreline of the reservoir including the right to hunt and fish in and on the aforesaid shoreline and reservoir, subject, however, to regulations governing the corresponding use by other citizens of the United States.

The congressional specification of a limited right of "access" to "hunt and fish" in the taken area which is itself "subject . . . to regulations governing the corresponding use by other citizens of the United States" when read in context, PB 40-47, constitutes the requisite "clear evidence" under *Dion* of a congressional choice to divest the Tribe of any arguably preexisting right to regulate others in the same taken area.¹¹

B. The Tribe and the United States slight the language of Section X and misconstrue the legislative history and context of the 1954 Taking Act.

1. The tribal approach to Section X.

The Tribe appears to argue, RB 28-29, that principles of contract apply to this case. Assuming application of such principles, the obvious effect of the "access" language of Section X was simply to create or reserve a contractual easement in the Tribe and not to create or reserve in the Tribe regulatory power over others.

The Tribe also argues that the use of the term "tribal council" within Section X indicates that the right to regulate non-Indians was somehow retained. RB 40. The plain meaning of this language, however, merely is that a tribal government's fishing enterprise could have "access" without cost but

¹¹ The same result follows under the Tribe's more general approach based on the canons of construction. See, e.g., the "fair appraisal" language of *Oregon Dept. of Fish and Wildlife v. Klamath Tribe*, 473 U.S. 753, 774 (1985).

that in so doing, it would be subject to laws governing the "corresponding use by other citizens of the United States."¹²

2. The United States essentially ignores the plain meaning of Section X.

The federal response to the language of Section X is essentially to ignore its plain meaning and to propose that recognizing tribal civil regulatory jurisdiction over the former trust lands would constitute an "appropriate means" for the Tribe to protect its grazing interests. USB 16-17. The district court, however, squarely rejected the claim that tribal regulation was necessary to protect these interests. DCO JA 71, 148. See also T 519, JA 377: (Tribe takes no responsibility for "monitoring the [grazing] permits.")

3. The context and legislative history of the Cheyenne River Act of 1954 do not call for a different result.

The heart of the argument of Tribe is that the context and legislative history of the Cheyenne River Act preclude a finding that Section X should be given its plain meaning. In particular, the Tribe alleges¹³ that it regularly exercised licensing authority over non-Indians at least on trust lands

¹² Two of the other taking acts on the Missouri River in South Dakota provide that the "tribe and members" (and not the "tribal council") should have access for hunting and fishing. See Pub. L. No. 87-735, 76 Stat. 704, 707 (1962) (Crow Creek-Big Bend); Pub. L. No. 87-734, 76 Stat. 698, 701 (1962) (Lower Brule-Big Bend). Language in taken area legislation also indiscriminately refers to either a "right to hunt and fish" or "permission to hunt and fish." Contrast, *id.*; with Pub. L. No. 85-923, 72 Stat. 1773, 1774 (1958) (Lower Brule - Fort Randall). The Tribe's reliance upon isolated words is, in this context, inappropriate.

¹³ The parties also base an argument on the tribal interest in land remaining after the taking. This argument has been met through a demonstration of the minimal nature of that interest, PB 34-35, and the lack of necessity for tribal court jurisdiction to safeguard that interest. See DCO JA 81-82, 148-149.

prior to 1954; that this licensing generated a pre-taking "revenue stream" (the phrase apparently being created for this appeal); that Congress did not separately compensate the Tribe for the loss of the alleged "revenue stream"; and that, therefore, the Congress cannot possibly have intended to deprive the Tribe of that "revenue stream." This is confirmed, according to the argument of the Tribe, by the supposed regular exercise of licensing jurisdiction on the taken area up to the present. These arguments are not sustained by the evidence in the record.¹⁴

Moreover, it should be noted that much of the pre-taking era evidence relied upon by the Tribe is not particularly relevant to the legislative context because there is no showing that Congress was informed of it or had any particular interpretation of it. Likewise, the general findings of the District Court on the assertion and exercise of tribal jurisdiction, *see*, DCO JA 65-66, insofar as they are intended to apply to the pre-taking era, do not demonstrate what Congress perceived about the pre-taking context. In any event, as will be noted below, the actual state of the evidence does not support the Tribe's contentions.

a. The evidence of tribal licensing of non-Indians hunting on any lands on the reservation prior to 1954 is equivocal at best.

The Tribe engaged a professional historian, Professor Herbert Hoover, to "discover any instances during which the Cheyenne River Sioux Tribe exercised civil jurisdiction over

¹⁴ It should also be noted that the map attached to Respondents' Brief is not, contrary to RB 11 n.14, a reproduction of Ex. 95 but has apparently been redesigned so as to enhance the tribal position by, for example, eliminating or truncating certain state highways and adding new material not in Ex. 95.

the behavior of non-Indians with the reservation." T 748. Hoover concentrated his scouring of the archives on the pre-taking era but failed to testify that any of the historical documents he produced at trial clearly demonstrated that any non-Indian had ever purchased a tribal license. *See* T 769-770.¹⁵ Moreover, none of the Tribe's exhibits or testimony, including the Hoover testimony, indicates that any non-Indian had ever been subjected to the jurisdiction of the tribal court on a hunting or fishing violation prior to 1954, *see* T 770-771 (or, indeed, prior to this litigation in 1988. *See* T 517-518, JA 374-375; T 548-549, JA 380). *See Montana*, 450 U.S. at 562 n.11.

The Tribe relies heavily upon Tribal Ordinance No. 2 enacted in 1937, which appears to assert authority over any

¹⁵ The Tribe has misconstrued several documents. Exhibit 93, at 16 (not "at 15", *see* RB 6) is cited for the proposition that the 1947 season was opened to "members and nonmembers." Exhibit 93 at 16, however, indicates only that there was a special season for "U.S. Indian Service employees of the Cheyenne River Agency." On cross-examination, Professor Hoover was unable to say that any non-Indian federal employees had actually purchased a tribal license. T 770. The Tribe also implies that Ex. 61 demonstrates that the Cheyenne River Tribe "derived considerable income from the sale of special [fishing] licenses and by serving as guides." *See* RB 25, *citing* JA 168-169. The section of the Exhibit referred to at JA 168-169 lists certain fishing related activities of Tribes in Minnesota and Wisconsin but there is no assertion that such activity took place on the Cheyenne River Reservation in South Dakota. Closed seasons on the Cheyenne River Reservation are noted in the same Exhibit, *see also*, Ex. 58 at 12, but it is not clear which entity actually closed them. *See* Ex. 51, (1938 reference to "State closed seasons" on South Dakota reservations.) Ex. 61 also describes a beaver trapping license system at Cheyenne River. JA 174-176. There is, however, no assertion of sales to non-Indians in the Exhibit and the skins needed a "state metal tag" to be legal. JA 175. Exhibit 58, a 1943 BIA report, does not, contrary to the implication of the Tribe, indicate that the Tribe exercised jurisdiction over non-Indians with regard to fishing. RB 4. To the contrary, the document states that the stocking of fish on the reservation had been performed by the "State Department of Game and Fish." Ex. 58 at 12. The same report indicates also that the counties of Dewey and Ziebach paid bounties on coyotes. *Id.*

"nonmember" with regard to hunting and fishing on the reservation. RB 4. The Tribe fails to quote Tribal Ordinance No. 3, enacted on the same day, which provides for the transfer of custody to federal or state law enforcement officers of "any person not subject to the jurisdiction of the Cheyenne River Sioux Indian Court. . . ." Ex. 3, JA 158. The 1937 ordinances thus do not constitute an unequivocal assertion of tribal jurisdiction over non-Indians.¹⁶

¹⁶ The Tribe cites the Indian Reorganization Act of 1934 as endorsing an expansive view of tribal jurisdiction and confirming the Tribe's claim to jurisdiction here. See RB 23-25, 45, 49. Such an interpretation might have been appropriate had the IRA been enacted as proposed; in fact, the bill was almost completely changed from the original proposal. As introduced in 1934, legislation provided that an Indian community which wished to exercise governmental authority within an area would apply for a charter to the Secretary of the Interior and that the Secretary could thereafter "grant" to the community the power "over all other cases arising under the ordinances of the community, criminal and civil, legal and equitable. . . ." Hearings before the Committee on Indian Affairs, House of Representatives, 73rd Cong. 2d Sess. on HR 7902 (1934) p. 2. John Collier indicated that this section provided for tribal civil and criminal jurisdiction over non-Indians. *Id.* at 28, 80; see also *id.* at 80 (Statement of Felix Cohen, Assistant Solicitor). Collier proposed creation of a special court to provide for appeals from the local Indian court, *id.* at 12, and included within the bill specific guarantees of the "civil liberties of minorities and individuals within the community." *Id.* at 2. Nonetheless, there was furious opposition. Senator Wheeler stated that "it would bring about all kind of conflicts between your Indians and the white people. . . ." Hearings Before Committee on Indian Affairs, Senate, 73rd Cong. 2d Sess. on S. 2755 (1934) at 68. He stated, "you are going entirely too far at the present time in letting these tribes set up their rules and regulations, because they might conflict", *id.* at 199-200, and said that the bill was a "step backward." *Id.* at 200. Wheeler thus caused drastic amendment of the bill, eliminating the provisions allowing tribal jurisdiction over non-Indians. See 78 Cong. Rec. 11,123 (1934). The legislative history of the Indian Reorganization Act thus indicates a decisive congressional rejection of expansive tribal power over non-Indians on reservations. To allow Section 16 of the IRA to be cited as authority for the very powers rejected by Congress in the enactment of the principal bill, as suggested by the Tribe, defies logic. See generally, Furber, *Two Promises, Two Propositions: The Wheeler-Howard*

To support its thesis of pre-taking licensing, the Tribe also relies on a statement of the tribal lawyer in a non-published hearing that white citizens must obtain "a license from the tribal council" before they go on the reservation "and hunt." Hearing of the Committee on Interior and Insular Affairs; Subcommittee of the Committee on Interior and Insular Affairs of the United States Senate, Subcommittee of the Committee on Interior and Insular Affairs of the House of Representatives on S. 695 (May 20, 1954) (hereinafter May 20, 1954, Hearing). Appendix RR 289, JA 214. The difficulty with this argument is that, beyond the bare assertion of the tribal lawyer, there is no evidence in the legislative record that this ever occurred, or that there was a licensing system applicable to non-Indians for hunting in place on the Cheyenne River Reservation at the time of the takings. Nor does this statement allege anything as to fishing on the Missouri River.¹⁷

Act as a Reconciliation of the Indian Law Civil War, University of Puget Sound Law Review 211 (1991). Finally, *Montana* itself rejected the argument that the IRA established or confirmed tribal civil regulatory jurisdiction over non-Indians. See *Montana*, 450 U.S. at 559 n.9.

¹⁷ The Tribe also argues that the comment of the tribal lawyer discussed above made clear to Congress that a tribal power to license on the taken area would exist after the taking. See, e.g., RB 39-40. However, the trial court found, and the court of appeals did not disturb, the finding that the comment of the tribal lawyer "was not alluding to future jurisdiction of the Tribe over nonmember hunting and fishing once the lands were actually taken." DCO, JA 128-129. Furthermore, it is of note that the comment of the tribal lawyer specifically recognized that the right granted under the Section X is a "right of access" or a "right of free access," PTA RR at 289, JA 213; the tribal lawyer certainly knew that a right of "access" was not a right to regulate. See generally, *New York ex rel. Kennedy v. Becker*, 241 U.S. 556 (1916).

- b. The record does not support the existence of any "revenue stream" to the Tribe from licensing prior to or in 1954.

There is no evidence of the alleged pre-taking "revenue stream" from sale of hunting licenses to non-Indians for there was no concrete evidence of any such licenses being sold to non-Indians. Moreover, it is telling that the Tribe failed to request a finding on the *existence* or *amount* of an alleged pre-taking "revenue stream" at trial, or of congressional knowledge of such an alleged "revenue stream." See NR 184, Tribal Defendants' Findings of Fact.¹⁸

- c. The Tribe was paid for the loss of all sportsmen's expenditures which hypothetically could take place on the taken area.

In any event, there is ample evidence in the legislative record that the Tribe was compensated for the wildlife resources in the taken area. See USB 17-18; RB 36-37. The Tribe sought \$74,300 capitalized at 4% to compensate it for "this loss of wildlife resources." May 20, 1954, Hearing, *supra* at 265-266, JA 207. It is instructive that the base figure sought was *not* for the \$36,600 "increase in store bills which

¹⁸ No evidence of any such "revenue stream" from hunting and fishing licensing of non-Indians appears in any BIA document in the record despite the fact that the BIA studied details of Indian activity to the point of determining, for example, that the estimated expenses for production of arts and crafts in 1943 were \$20. See Exhibit 58, p. 13. It is also noted that Ex. 93, p. 15 indicates that the Tribe sold 114 big game licenses reservation wide in 1946 for a return of \$285; these licenses were sold "from appearances *exclusively to tribal members*." While the State does not concede that the record shows the sale of *any* licenses to *non-Indians*, the Ex. 93 statistics *do* show that a "revenue stream" from such sales for use on what was to become the taken area would be minuscule in comparison with the amount ultimately claimed by the Tribe for the loss of the wildlife resource. (\$74,300 capitalized to \$1,857,500. See JA 207-208.)

will result from the loss of game for food" as described by federal documents. Missouri Basin Investigation Report No. 138 at 78 (1954), PTA BB at 78, JA 193. Rather, the claim was for capitalization of more than *double* that amount (\$74,300 capitalized to \$1,857,500) and was based on "sportsmen's expenditures" or "*the amount sportsmen are willing to spend to bag the various species of game.*" Report No. 138, *supra* at 77-78, JA 191-192 (emphasis added). Report No. 138 speaks in general terms about these expenses, mentioning, for example, the cost of travel, equipment and hotel bills. *Id.* The tribal use of a "sportsmen's expense" amount in its demand to Congress and the Tribe's acceptance of the total settlement ultimately offered by Congress, see JA 265-267, preclude an argument now that it was not reimbursed for sportsmen's expenses such as licensing.¹⁹

The United States and the Tribe also appear to assert that Congress could not have intended to pay for licensing revenue as part of the payment for wildlife resources and land because it did not explicitly say so. This assertion falls under its own weight. Tribal President Frank Ducheneaux in 1954 testified briefly to the congressional committee that the Tribe ought to be paid for the loss of tax revenue, apparently property tax revenue, from the area to be taken for the reservoir. See PTA RR 205. Yet there was no separate compensation for the loss of such revenue identified in the record. Assuming the accuracy of the Tribe's argument, the Tribe still has the right either to tax the area in question or, at the very least, go to the court of claims and demand compensation for the lost tax revenues. The theory underlying the tribal argument is untenable.

¹⁹ The tribal witness at the May 20, 1954, Hearing, JA 207, cited the 1951 Fish and Wildlife study which in turn was incorporated in Report No. 138, *supra*, at 78, JA 193-195.

C. The lack of post-taking activity on the taken area by the Tribe discredits its claim to jurisdiction.

1. The Tribe's post-taking activity has been minimal.

The Tribe also asserts that, after the takings, it continuously enforced hunting and fishing regulations against all hunters and fishers within the taken area. Yet the admissions of the Tribe at trial were to the contrary. Tribal President Wayne Ducheneaux admitted at trial that prior to the pendency of this litigation, there had never been a single civil or criminal action brought by the Tribe against a nonmember or non-Indian in tribal court on a hunting and fishing violation occurring at any place within the taken area. T 548-549; JA 380.²⁰ See also T 517-518, JA 374-375.

The Tribe relies upon the statement of the district court that the Tribe "prior to this lawsuit" enforced its "game and fish regulations on the lands in dispute," DCO JA 66, and represents this language as the sum and substance of the district court's findings on the issue. The Tribe thus ignores the Memorandum Opinion of the district court on December 5, 1988, in which it indicated that on three occasions tribal game wardens "have confronted non-Indian hunters presumed to be in violation of tribal hunting law. . . ." JA 16. In the first instance, a stop of a non-Indian on the taken area in 1987, the tribal officer was told by "state and federal officials" that the "Tribe lacked jurisdiction" and the non-Indian was released. JA 19 n.2. (See also, PHT 204-205, Exhibit 257, T 561-562.) A sale of tribal licenses to non-Indians on fee lands was later resolved by the refund of the license price. JA 19 n.2. These incidents, of course, undermine the Tribe's

²⁰ As to the Tribe's supposed assertion of jurisdiction, it is of note that, in 1983, the Tribe in its *public statement* indicated that its licenses were valid "only on tribal land." Exhibit 214, JA 282. In 1985, in a decision implemented in 1988, see T 527, the Tribe moved to abandon this stance and "go for total jurisdiction as far as hunting, fishing . . ." (in the words of the tribal writer). Ex. 258, JA 286.

claim that it continually exercised jurisdiction. (How the third incident was handled is not discussed.)

The trial court's view as to the enforcement of tribal jurisdiction apparently may be reduced to its finding that "[h]istorically, tribal game wardens have sought to avoid confrontation . . . by allowing non-Indians improperly hunting without a tribal license to buy the \$8 sticker rather than aggressively pursuing civil charges or confiscating property." JA 17. The record, however, contains no evidence that any licenses were actually sold to a non-Indian on the taken area and no such assertion appears in the testimony of the tribal game wardens. See T 502 (Warden Clown); T 499 (Warden Maynard); PHT 210-212, 214-215 (Warden Rousseau).²¹ In any event, the finding of the district court when read in light of the earlier opinion of the court and of the record, stands for much less than the Respondents would have this Court believe. See as to the low level of other tribal wildlife management, DCO JA 74.

2. The Tribe can make no claim to management of the Oahe Reservoir fishery or enforcement of regulations on the Reservoir.

The Tribe cannot claim to be involved in the management or enforcement of fishing regulations on the Missouri River itself for, at the time of trial, it had only one boat which it had taken out on the Missouri River "once" as a "demonstration." T 506-507, JA 362. The tribal witnesses, moreover, admitted that the tribe did no stocking or management on the River, T 520-521, JA 379, and that it had no plans to do so. See T 839-340; JA 381-382. See also, DCO, JA 74, 76. (The state's vigorous and highly successful activities are set out at PB 6-7. See also DCO JA 77-79.)²²

²¹ Warden Rousseau did testify that he had once confronted three unidentified non-Indians on Corps land who did have tribal licenses. PHT 215-216.

²² The Tribe belittles the State's stocking of 72 million fish in the reservoir from 1970 to the time of trial in 1988, JA 78, but asks credit in

D. The Eighth Circuit erred in its application of *Dion*.

The clear language of Section X, which recognizes only a right of "access" to hunt and fish in the Tribe, together with the congressional offer and the tribal acceptance of payment for wildlife resources, indicate an "unmistakable" policy choice under *Dion* to divest the Tribe of whatever civil regulatory jurisdiction it arguably may have had over non-Indians hunting and fishing in the taken area. This view is strengthened, we would submit, by consistent federal administrative interpretation, by the vigorous actions of the State in developing the area, especially the now nationally famous fishery, and by the inactivity of the Tribe. The court of appeals thus erred in its application of *Dion*.²³

CONCLUSION

The State respectfully requests that this Court reverse the determinations of the court of appeals.

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this Court for "its stocking of 20,000 walleye fingerlings" in Lake Oahe, citing an article published in a local paper November 22, 1992, seventeen days after the grant of certiorari. RB 13. The Tribe also claims credit for the acquisition of more boats and personnel in an article published even later. *Id.* The use of this extra record material by the Tribe highlights its lack of prelitigation activity.

²³ The State rests upon its previously made argument with regard to taken area lands acquired from non-Indians. See PB 47-49.

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In the Supreme Court of the United States

OCTOBER TERM, 1992

SOUTH DAKOTA, PETITIONER

v.

GREGG BOURLAND, ETC., ET AL.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

**BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING RESPONDENTS**

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QUESTION PRESENTED

Whether the Cheyenne River Sioux Tribe has any authority to regulate non-Indian hunting and fishing on lands and waters that are within its Reservation and that were acquired by the United States for a dam and reservoir pursuant to the Cheyenne River Oahe Act of 1954.

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In the Supreme Court of the United States

OCTOBER TERM, 1992

No. 91-2051

SOUTH DAKOTA, PETITIONER

v.

GREGG BOURLAND, ETC., ET AL.

ON WRIT OF CERTIORARI TO THE
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BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING RESPONDENTS

INTEREST OF THE UNITED STATES

The United States has a longstanding interest in questions of tribal regulatory jurisdiction because of its special relationship with Indian tribes and its experience and expertise in Indian law matters. In addition, the United States has a particular interest in the subject matter of this case. The United States is the owner of the lands at issue, and resolution of the question presented turns on the legal effect of the acquisition of those lands by the United States. The outcome of this case also could affect tribal authority to regulate non-Indian hunting and fishing at a number of other federally owned sites located within Indian reservations.

STATEMENT

This declaratory judgment action was brought by the State of South Dakota to challenge the authority of the Cheyenne River Sioux Tribe to regulate hunting and fishing by nonmembers of the Tribe on certain lands within the Cheyenne River Reservation that are owned by the United States.

1. a. The present-day Cheyenne River Reservation lies in north-central South Dakota, bordered on the east by the Missouri River. The Fort Laramie Treaty of 1868, 15 Stat. 635, established the boundaries of the Great Sioux Reservation, which included all of South Dakota west of the Missouri River. Under Article II of the Treaty, the reservation lands were "set apart for the absolute and undisturbed use and occupation" of the Sioux Tribes. 15 Stat. 636. Article II also provided that "no persons except those herein designated and authorized so to do * * * shall ever be permitted to pass over, settle upon, or reside in the" Reservation. *Ibid.*

In 1889, Congress removed substantial lands from the Great Sioux Reservation created by the Fort Laramie Treaty of 1868 and divided the balance into five separate reservations, one of which was the Cheyenne River Reservation. Act of March 2, 1889, ch. 405, § 4, 25 Stat. 889. The Act expressly provided "[t]hat all the provisions of [the Fort Laramie Treaty of 1868] * * * not in conflict with the provisions and requirements of this act, are hereby continued in force according to their tenor and limitation." § 19, 25 Stat. 896. The Act also authorized the President to make allotments of land within the Reservations to individual Indians. § 8, 25 Stat. 890. Some of the allotted parcels on the Cheyenne River Reservation were later acquired by nonmembers of the Cheyenne River Sioux Tribe through sale or inheritance. Subsequently, some of the unallotted and surplus lands on the Reservation were sold to nonmembers pursuant to the Act

of May 29, 1908, ch. 218, 35 Stat. 460; see *Solem v. Bartlett*, 465 U.S. 463, 472-476 (1984).

Today, the Reservation consists of approximately 2,800,000 acres of land. About half of the total Reservation acreage is held by the United States in trust for individual Indians or for the Tribe. Pet. App. A67, A71. In addition, more than 100,000 acres of lands that had been held in trust (the "taken area" at issue in this case) were acquired by the federal government in 1954 for construction of a dam and reservoir. *Id.* at A10-A11 & n.9; see pages 3-5, *infra*.¹ The balance of the land in the Reservation is owned in fee by nonmembers of the Tribe, except for 18,000 acres of such fee lands that were acquired by the United States in 1954 for the dam and reservoir. Pet. App. A71. The trust lands are located throughout the Reservation, but are concentrated along the Missouri and Cheyenne Rivers, where the taken area is also located. *Id.* at A72. The district court found that "[v]irtually all the land adjacent to the [federal lands] is trust land." *Id.* at A77; see map appended to Brief for the Respondents. Indians constitute 58% of the population of the two South Dakota counties within which the Reservation is located. *Id.* at A72.

b. In 1944, Congress authorized establishment of a comprehensive flood control plan along the Missouri River. See Flood Control Act of 1944, ch. 665, 58 Stat. 887. Seven subsequent statutes authorized limited takings of Indian lands from reservations along the River for specific dam projects. See *Lower Brule Sioux Tribe v. South Dakota*, 711 F.2d 809, 813 n.1 (8th Cir. 1983), cert. denied, 464 U.S. 1042 (1984). The largest such taking involved the 104,420 acres taken on the Cheyenne River Reservation by authority of the Act of September 3, 1954, ch. 1260, 68 Stat. 1191 (Cheyenne River Oahe

¹ The United States also acquired approximately 3000 acres that were owned in fee by tribal members. See Pet. Br. 3.

Act). See Pet. App. A131. The bottom lands taken for the Oahe Dam and Reservoir were the most valuable lands possessed by the Tribe. *Id.* at A141. Congress appropriated \$10,644,014 for the taken lands and interests therein, and for rehabilitation of the Indians and restoration of their tribal life. Cheyenne River Oahe Act, §§ 2, 5, 68 Stat. 1191, 1192.

A number of provisions of the Cheyenne River Oahe Act were designed to minimize the impact of the taking on the Tribe and to preserve substantial tribal interests in the taken lands. For instance, in Section 5 of the Act, the United States agreed to provide funds to be "expended upon the order and direction of the Tribal Council," such that "the economic, social, religious, and community life of all said Indians shall be restored to a condition not less advantageous to said Indians than the condition that the said Indians now are in." 68 Stat. 1192. Section 6 provided that all mineral rights in the taken area were reserved to the Tribe or tribal members, and could be exploited subject to reasonable regulation for the protection of the dam and reservoir project. 68 Stat. 1192. Section 7 gave members of the Tribe rights to remove timber and to salvage improvements within the taken area until the gates of the dam were closed. 68 Stat. 1192. Section 9 allowed members of the Tribe to continue to reside on the taken land until closure of the dam. 68 Stat. 1192. Section 10 preserved for the Tribe and its members the right to graze stock within the taken area after closure of the dam, 68 Stat. 1193, and Section 8 provided that the United States would take protective measures to minimize losses to Indian livestock from the rise and fall of the reservoir. 68 Stat. 1192. Section 10 also preserved for the Tribe and its members "the right of free access to the shoreline of the reservoir including the right to hunt and fish in and on the aforesaid shoreline and reservoir, subject, however, to regulations gov-

erning the corresponding use by other citizens of the United States." 68 Stat. 1193.²

c. The district court found that subsistence hunting and fishing, though not widely practiced by tribal members, "is an important cultural, social, and religious activity" for them. Pet. App. A74-A75. It furthers traditional tribal values, under which able-bodied members are exhorted to care for the needy, weak, and elderly, and it "honors a fundamental Lakota philosophy of courage, wisdom, and generosity." *Ibid.* The court found, however, that tribal regulation of hunting and fishing is not necessary at this time to ensure the continued ability of tribal members to engage in subsistence hunting and fishing. *Id.* at A75-A77.

The district court also found that "[t]he Tribe has always asserted jurisdiction over all hunting and fishing activities on the reservation, including nonmember fee lands and the taken area," and has never acquiesced in "State assertion of jurisdiction over hunting and fishing activities on the reservation." Pet. App. A72; see also *id.* at A137. Shortly after passage of the Indian Reorganization Act of 1934, ch. 576, 48 Stat. 984, 25 U.S.C. 461 *et seq.*, the Tribe enacted ordinances, approved by the Bureau of Indian Affairs, which required nonmembers to obtain a tribal permit to hunt or fish on the Reservation. Pet. App. A73. Although the Tribe made "signifi-

² The Army Corps of Engineers has promulgated regulations governing public use of water resource development projects, including the Oahe Reservoir. See 36 C.F.R. Pt. 327. They govern, *inter alia*, the operation of vehicles, vessels, and aircraft, 36 C.F.R. 327.2-327.4; provide for swimming, picnicking, hunting, fishing, and trapping except where prohibited, 36 C.F.R. 327.5-327.6, 327.8, and for camping where permitted, 36 C.F.R. 327.7; and provide that the District Engineer in charge of a project may designate visiting hours and restrictions with respect to a portion of a project "when necessitated by reason of public health, public safety, maintenance, or other reasons in the public interest." 36 C.F.R. 327.12(a).

cant" progress in wildlife management in the 1930s and 1940s, in recent years "inadequate funding has prevented the tribe from sustaining an independent and vigorous scheme of wildlife management on the reservation." *Id.* at A81. The State has implemented a "comprehensive wildlife regulatory program" funded by revenues from recreational hunting. *Id.* at A84. The State's program has included stocking fish and monitoring fish populations in the Oahe area. *Id.* at A85-A86.

Prior to this suit, both the Tribe and the State enforced their respective game and fish regulations on the lands in dispute and were usually able to agree on the scope of appropriate regulation. Pet. App. A73. The Tribe enforced its regulations against all violators, while the State limited its enforcement to nonmembers. *Ibid.*

In 1988, the Tribe and the State were unable to agree on appropriate limits for the deer season. Pet. App. A59. The Tribe asserted that the State's proposal "did not adequately protect the grazing permit rights of tribal members" in the taken area. *Id.* at A64. When the Tribe declared that it would refuse to recognize state hunting licenses and would require hunters within the Reservation to obtain a tribal license, see *id.* at A64-A65, the State brought this action. It sought a declaratory judgment that the Tribe may not criminally prosecute nonmembers found hunting on the taken lands, that the Tribe may not exclude nonmembers from hunting on non-trust lands within the Reservation, and that the taking of the tribal lands for the dam and reservoir had *pro tanto* diminished the Reservation. *Id.* at A60.

2. After a trial on the merits, the district court found that the conveyance of the lands to the United States for construction of the dam and reservoir did not affirmatively demonstrate an intent to diminish the Reservation, especially in light of the fact that the Tribe retained grazing, mineral, hunting and fishing, and other rights in the

taken area. Pet. App. A96-A112.³ Petitioner did not challenge that ruling on appeal, although the court of appeals likewise found it "clear" that "the Cheyenne River [Oahe] Act did not disestablish the boundaries of the Reservation." *Id.* at A21.

On the question of the Tribe's authority to regulate nonmember hunting and fishing, the district court took a different approach. In the district court's view, this Court in *Montana v. United States*, 450 U.S. 544 (1981), stated a general rule that an Indian Tribe could exercise jurisdiction over nonmembers on non-tribal land within a reservation—regardless of the circumstances under which the land had been alienated or the identity of the present owner—only "(1) where Congress has expressly delegated jurisdiction to the tribe; (2) where a nonmember has essentially consented to tribal jurisdiction through a business relationship or otherwise; and (3) where the conduct of the nonmember imperils the tribe's political integrity, economic security, or health and welfare." See Pet. App. A113-A114. The district court concluded that none of those conditions was satisfied and that the Tribe therefore could not regulate hunting and fishing by nonmembers on any of the taken lands. *Id.* at A130-A159. The court did not reach the question of the extent of the State's jurisdiction over nonmember hunting and fishing on the taken lands. *Id.* at A115-A118.

3. The court of appeals reversed and remanded, separately analyzing the portion of the taken area that had been held in trust prior to the taking (the former trust lands) and the portion that had been held in fee by non-

³ As to lands that had been acquired in fee from non-Indians, the district court recognized (Pet. App. A98-A99) that it was bound by *Solem v. Bartlett*, 465 U.S. 463 (1984). *Solem* held that the Act of 1908, opening up some 1.6 million acres of land on the Cheyenne River Reservation to settlement, did not alter the original Reservation boundaries.

member owners prior to the taking (the former fee lands).

With respect to the former trust lands, the court of appeals ruled that the Tribe has authority, subject to the specific limitations found in the Cheyenne River Oahe Act, to regulate nonmember hunting and fishing. The court determined that the purpose of the Act was to construct a dam and reservoir, a purpose that was not inconsistent with continued tribal control and that distinguished this case from *Montana* and *Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation*, 492 U.S. 408 (1989). Pet. App. A26, A36-A37. The court of appeals relied on this Court's decisions in *United States v. Dion*, 476 U.S. 734, 738-740 (1986), *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 690 (1979), and *Menominee Tribe of Indians v. United States*, 391 U.S. 404, 413 (1968), for the proposition that Congress will not be held to have divested a tribe of its treaty rights unless that purpose is apparent from the language and purpose of a statute. Pet. App. A39-A40. Because, as the district court held, Congress had not addressed the question of continued tribal jurisdiction over the taken lands when it passed the Cheyenne River Oahe Act, Pet. App. A39, the court of appeals concluded that the Tribe retained its treaty-based right to regulate nonmember hunting and fishing within the Reservation on the former trust lands. *Id.* at A40-A42.

With respect to the lands—totalling approximately 18,000 acres—that the United States government had acquired from the former fee owners, the court held that *Montana* and *Brendale* were controlling precedents. Pet. App. A43-A45. As had this Court in *Montana*, the court of appeals noted that Congress had not expressly granted the Tribe regulatory authority over nonmembers on the former fee lands, at least insofar as those lands had originally been alienated pursuant to an allotment act

that contemplated elimination of tribal jurisdiction. Pet. App. A44-A45 & n.19. The court remanded for the district court to reconsider whether the Tribe could regulate nonmember hunting and fishing on the former fee lands under one of the exceptions outlined in *Montana* for situations in which non-Indians enter into a consensual relationship with the Tribe or its members, or in which conduct by non-Indians threatens the Tribe's political integrity, economic security, or health and welfare. Pet. App. A46. Although the district court had previously performed such an analysis with respect to the taken area as a whole, the court of appeals determined that the inquiry should be undertaken again, in light of its holding that the Tribe retains regulatory jurisdiction over the former trust lands. *Ibid.*

SUMMARY OF ARGUMENT

Both before and after the former trust lands in this case were taken by the United States for construction of a dam and reservoir, they were part of the Cheyenne River Reservation. Thus, before the 1954 taking, the Tribe had sovereign authority to regulate hunting and fishing by both members and nonmembers on those lands. The question presented in this case is whether the 1954 Cheyenne River Oahe Act, under which the lands were acquired by the United States, entirely deprived the Tribe of the authority it had previously exercised over hunting and fishing by nonmembers.

There are two sources of the tribal regulatory authority in this case: the rights granted to the Tribe in the Fort Laramie Treaty of 1868, and the Tribe's inherent sovereignty. Although the court of appeals largely relied on the Tribe's treaty rights, a finding that the Tribe possesses authority from either source would be dispositive of this case. But regardless of which source is consulted, the Cheyenne River Oahe Act did not entirely divest

the Tribe of its right to regulate nonmember hunting and fishing on the former trust lands.

Insofar as the tribal regulatory authority at issue derived from the 1868 Treaty, the proper analysis rests on the settled rule that statutes will be presumed not to work a deprivation of a tribe's treaty rights unless it is clear from the statutory language itself (or from an examination of its purposes and history) that Congress intended to do so. In this case, no such intent generally to deprive the Tribe of authority over hunting and fishing on reservation land is apparent from the face of the Cheyenne River Oahe Act, which in fact reserved substantial rights for the Tribe and its members on the very lands at issue. Nor can any such intent be inferred from the purpose of the Act, which was to provide for construction of a dam and reservoir, or from its legislative history. Accordingly, the court of appeals correctly held that the Tribe retains jurisdiction to regulate hunting and fishing on the former trust lands by both members and nonmembers, so long as that regulation is consistent with the Cheyenne River Oahe Act and other applicable federal requirements.

Insofar as the Tribe's right to regulate hunting and fishing arose from the Tribe's inherent sovereignty, the analysis is similar. The Tribe's status as a dependent sovereign is not inconsistent with its regulation of hunting and fishing on federal lands, so long as that regulation is consistent with applicable federal statutes and regulations. Indeed, inherent tribal sovereignty has long existed side-by-side with a substantial federal presence on Indian reservations established by federal law. Nor does anything in the Cheyenne River Oahe Act suggest that Congress intended to eliminate the Tribe's rights to regulate hunting and fishing when the United States acquired the property interests of the Tribe and its members in the former trust lands to build a dam and reservoir. The

Tribe's inherent sovereignty thus provides an additional basis for its authority in this case.

The Tribe's continued regulation of hunting and fishing on the former trust lands is entirely consistent with this Court's decision in *Montana v. United States*, which held that a tribe may not regulate hunting and fishing by nonmembers on lands within a reservation that had been alienated to individual non-Indians pursuant to allotment acts. The purpose of those acts was the destruction of tribal sovereignty and the ultimate dissolution of the reservations in question. As made clear in the partial plurality opinion in *Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation*, the Court in *Montana* found that it would be inconsistent with that purpose to permit continued tribal regulation of nonmember conduct on private fee lands. In this case, by contrast, no such purpose can be inferred from the statute pursuant to which the land was alienated. Moreover, the land at issue here was not alienated to private parties for their use and occupancy in the manner in which private land is generally held, but to the United States for the special and limited purpose of constructing a dam and reservoir, while preserving important Indian interests and uses.

ARGUMENT

I. THE TRIBE'S PRE-1954 RIGHT TO REGULATE HUNTING AND FISHING BY NONMEMBERS WITHIN THE RESERVATION ON THE FORMER TRUST LANDS WAS NOT ENTIRELY DIVESTED BY THE CHEYENNE RIVER OAHE ACT

Prior to acquisition of the former trust lands by the United States in 1954, the Tribe had authority to regulate hunting and fishing on those lands. That authority was derived from two sources: the Fort Laramie Treaty of 1868, 15 Stat. 635, and the Tribe's inherent authority as sovereign that survived its association with the United

States. Although the Cheyenne River Oahe Act limited the scope of tribal authority to regulate hunting and fishing by nonmembers on the former trust lands, it did not entirely eliminate it.

A. The Cheyenne River Oahe Act Did Not Abrogate the Tribe's Treaty Right to Regulate Nonmember Hunting and Fishing

1. By setting aside the reservation lands for the Tribe's "absolute and undisturbed use and occupation," Article 2 of the Fort Laramie Treaty, 15 Stat. 636, recognized a right in the Tribe to condition nonmembers' use of that land on their obedience to tribal regulations. See *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 337 (1983); see also *Montana v. United States*, 450 U.S. at 558-559; *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 144-148 (1982). The treaty thus confirmed the principle that "Indian tribes are unique aggregations possessing 'attributes of sovereignty over both their members and their territory.'" *New Mexico v. Mescalero Apache Tribe*, 462 U.S. at 332 (quoting *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142 (1980), and *United States v. Mazurie*, 419 U.S. 544, 557 (1975)). It follows that, prior to 1954, the Tribe had authority under the Treaty of 1868 to regulate hunting and fishing on the former trust lands.⁴ The State does not appear to disagree with that proposition.

In 1954, the former trust lands were taken by the United States and compensation was paid to the Tribe

⁴ As this Court noted in *New Mexico v. Mescalero Apache Tribe*, 462 U.S. at 337 & n.21, Public Law 280, enacted in 1953, 67 Stat. 588, expressly provided that States were not authorized to "deprive any Indian or any Indian tribe, band, or community of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing or regulation thereof." 18 U.S.C. 1162(b) (emphasis added by the Court).

and its members pursuant to the Cheyenne River Oahe Act, ch. 1260, 68 Stat. 1191. Although the State contended in the district court that the 1954 Act removed the federal lands from the Reservation entirely, that contention was rejected by the district court, Pet. App. A96-A112, and not renewed by the State in the court of appeals. The primary question in this case is thus whether the Cheyenne River Oahe Act, and the consequent acquisition of the former trust lands by the federal government, divested the Tribe of all jurisdiction to regulate hunting and fishing by nonmembers on the former trust lands, notwithstanding that the Act did not remove those lands from the Reservation.

2. This Court has frequently confronted claims that a statute abrogates rights granted to an Indian tribe, and the standards governing such claims are well-settled. Congress has the power to abrogate by legislation the treaty rights granted to Indians. See, e.g., *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 594 (1977); *Lone Wolf v. Hitchcock*, 187 U.S. 553, 566 (1903). But, before such an intent will be found, it is "essential" that there be "clear evidence that Congress actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other, and chose to resolve that conflict by abrogating the treaty." *United States v. Dion*, 476 U.S. 734, 740 (1986).⁵ Compare *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 111 S. Ct. 2166, 2170 (1991) (quoting *United States v. Bass*, 404 U.S. 336, 349 (1971) ("In traditionally sensitive areas, . . . the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision.")).

⁵ A congressional determination to abrogate Indian rights can either be "expressed on the face of the Act or be clear from the surrounding circumstances and legislative history." *Mattz v. Arnett*, 412 U.S. 481, 505 (1973). See also *Rosebud Sioux Tribe v. Kneip*, 430 U.S. at 587, 588 n.4.

In *Dion*, for example, an Indian claimed that his rights under a treaty to hunt bald and golden eagles survived enactment of federal legislation prohibiting such hunting without a special permit issued by the Secretary of the Interior. The Court stated that "[a]s a general rule, Indians enjoy exclusive treaty rights to hunt and fish on lands reserved to them," 476 U.S. at 738, and that "Congress' intention to abrogate Indian treaty rights [must] be clear and plain." *Ibid.* Although the Court found that Congress had in fact abrogated the right at issue in *Dion*, that result followed from the Court's conclusion that the relevant statutes "reflected an unmistakable and explicit legislative policy choice that Indian hunting of the bald or golden eagle * * * is inconsistent with the need to preserve those species." *Id.* at 745.

The general rule that "Indian treaty rights are too fundamental to be easily cast aside," *Dion*, 476 U.S. at 739, has been applied to claims that Congress eliminated a tribe's treaty rights to hunt and fish when it terminated federal supervision over the tribe, *Menominee Tribe of Indians v. United States*, 391 U.S. 404, 410-411 (1968); that a treaty with Canada implicitly deprived a tribe of its rights under a treaty between the tribe and the United States to a portion of the run of fish on specified waters, *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 690-692 (1979); and that the statute granting diversity jurisdiction to the federal courts limited the authority of tribal courts to adjudicate, at least in the first instance, disputes arising on a reservation, *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9, 17-18 (1987). See also *Solem v. Bartlett*, 465 U.S. 463, 470-471 (1984); *Mattz v. Arnett*, 412 U.S. 481, 504-505 (1973). Indeed, the rule requiring a clear statement for abrogation of Indian rights is closely related to the more general rule that "statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit," *Montana v. Black-*

feet Tribe of Indians, 471 U.S. 759, 766 (1985); see *County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation*, 112 S. Ct. 683, 693 (1992), and is rooted in the special relationship between the United States and Indian tribes. See, e.g., *Tulee v. Washington*, 315 U.S. 681, 684-685 (1942). Those principles are fully applicable to this case.

3. No clear intent to eliminate entirely the Tribe's authority to regulate hunting and fishing on the lands at issue here can be inferred from the Cheyenne River Oahe Act or related legislation. Indeed, both courts below agreed that the Act and legislative history are silent on the subject of the Tribe's regulatory jurisdiction over the area, although they disagreed on the consequences of that silence. Pet. App. A38-A39, A138 ("[c]ircumstances surrounding the Cheyenne River [Oahe] Act indicate that the jurisdiction issue simply was not considered"). That conclusion is correct; insofar as any congressional intent with respect to continued tribal jurisdiction can be gleaned, it was an intent to modify or eliminate tribal rights only to the extent that their continued exercise would be inconsistent with use of the land pursuant to the authorized purposes of the federal project. See generally *ETSI Pipeline Project v. Missouri*, 484 U.S. 495 (1988).

The Act contains a number of provisions suggesting that Congress intended not to intrude unnecessarily upon tribal rights. For example, the Tribe retains "all mineral rights of whatsoever nature" in the lands in question, subject only to regulations for the protection of the dam and reservoir, § 6, 68 Stat. 1192. The Tribe and its members also retain the right to graze stock without charge on the taken lands,⁶ and the Tribal Council and tribal

⁶ The United States assumed a corresponding obligation under Section 8 of the Act, 68 Stat. 1192, to take protective measures in its operation of the dam and reservoir to minimize losses to Indians with respect to their livestock that might result from the rise and fall of waters in the reservoir.

members have free access to the shoreline, including the "right to hunt and fish," subject only to "regulations governing the corresponding use by other citizens of the United States." § 10, 68 Stat. 1193. In addition, before the dam's gates were closed and the reservoir filled, members of the Tribe had the right to "cut and remove all timber" and to "salvage any portion of the improvements" on the land, § 7, 68 Stat. 1192, and to continue to reside on and use the taken lands, § 9, 68 Stat. 1192-1193. The foregoing provisions appear to have left the Tribe with rights to virtually all of the economically viable uses of the land that were consistent with its use as a reservoir.

The State argues (Pet. Br. 34-35) that the fact that tribal regulation of hunting and fishing on the former trust lands is subject to regulations governing "corresponding" use by other citizens limits the Tribe's retained rights. We agree with that proposition, as did the court of appeals (Pet. App. A42-A43); the provision expressly subjects the Tribal Council and tribal members to any federal regulations concerning the use of the reservoir by other citizens of the United States. See note 2, *supra*.

In addition, a reasonable implication of the proviso is that nonmembers ("other citizens") have a right to hunt and fish on the former trust lands—a conclusion that is supported by Section 4 of the Flood Control Act, which provides that "water areas of all such [reservoirs on federal flood control projects] shall be open to public use generally." 16 U.S.C. 460d. Thus, in our view, the court of appeals was correct in holding that the Tribe may not impose a "flat ban" or "unreasonably discriminatory limits" on nonmember hunting and fishing on the taken lands, even in the absence of federal regulations expressly barring such tribal regulations. Pet. App. A43. But the fact that Congress limited the Tribe's regulatory jurisdiction over the former trust lands in that specific manner does not establish that Congress intended *sub silentio* to outlaw *all* regulation by the Tribe. Indeed, the Tribe's

continued regulatory jurisdiction over the former trust lands is an appropriate means for the Tribe to protect the substantial continuing interests of the Tribe and its members in the taken lands.⁷ In short, nothing on the face of the 1954 Act or in its primary purpose—the acquisition of lands by the United States "for the construction, protection, development, and use of" the Oahe Reservoir, 68 Stat. 1191—suggests that Congress intended to abrogate the Tribe's treaty right to regulate on-reservation hunting and fishing on those lands. The court of appeals thus correctly decided that the Tribe retained those treaty rights after 1954, notwithstanding the transfer of title to the land to the United States.

The State also argues (Pet. Br. 41-44) that the legislative history of the Cheyenne River Oahe Act supports the conclusion that Congress intended to abrogate the Tribe's treaty right to regulate hunting and fishing by nonmembers on the taken lands. The statements quoted by the State, however, all concern the amount of compensation to be paid to the Tribe for its loss of *property* rights in the taken area; they simply emphasize the point that all concerned were focusing on property interests, not on jurisdictional issues.⁸ Similarly, the statement

⁷ In this case, one basis for tribal regulation was the conclusion by the Tribe that state regulation did not adequately protect its grazing rights. See Pet. App. A64. Although the district court found that both members and nonmembers "may have harassed cattle grazing * * *, failed to close pasture gates, or let down wires on fences," the court found that the problems were not "so extreme and pervasive as to warrant extraordinary enforcement efforts by state or tribal game officers." Pet. App. A78. The court's recognition that hunters and fishers may have threatened the Tribe's grazing and other property interests, however, demonstrates the Tribe's continuing interest in regulating hunting and fishing, notwithstanding the court's finding that "extraordinary enforcement efforts" were not necessary.

⁸ The legislative history contains only one reference to the Tribe's authority to regulate hunting and fishing. As the district court noted (Pet. App. A136-A137), the attorney for the Tribe stated

(Pet. Br. 41) from the legislative history of the 1950 Act authorizing negotiation of contracts with the Cheyenne River and Standing Rock Sioux Tribes simply confirms the expectation that the Tribes would be compensated for hunting and fishing rights "[t]o the extent that these may be impaired or destroyed." 96 Cong. Rec. 15,609 (1950). There was no suggestion that the Tribes' distinct sovereign authority to regulate hunting and fishing would be destroyed, nor is it clear what sort of compensation could be offered had Congress determined that divestiture of that regulatory authority was necessary.⁹

quite clearly during hearings on the Act that the Tribe had authority to regulate hunting and fishing by non-Indians on its reservation. *Acquisition of Lands and Rehabilitation of Cheyenne River Sioux Reservation, South Dakota and for Other Purposes: Hearings on H.R. 2233 and S. 655 Before the Comm. on Interior and Insular Affairs Joint Senate and House Subcomm. on Indian Affairs*, 83d Cong., 2d Sess. 289 (1954) ("No white citizen of South Dakota can go on this reservation and hunt unless he has first obtained a license from the Tribal Council."). Despite the fact that Congress was informed that the Tribe required nonmembers to obtain tribal licenses, however, it took no action to divest the Tribe of its regulatory power.

⁹ The State is also incorrect in claiming (Pet. Br. 45) that there has been a "consistent administrative interpretation" of the Act that supports its position. The 1986 letter from Col. West, Corps of Engineers District Engineer, states only that the Corps had previously taken the position that "regulation of hunting and fishing on Corps project lands in South Dakota is a matter of state law." Pet. Br. 45. When read in context of the entire letter (see Pet'r Tr. Br. App. LL), that statement simply meant that the Corps did not regulate hunting and fishing on those lands. As a later letter quoted by the State (Pet. Br. 45 n.33) explains, the Corps "[took] no position as to whether the Tribe or State ultimately should have jurisdiction in this matter." Finally, the conclusion in a March 9, 1976, letter from a Corps officer that "the fish and game laws of the State of South Dakota are the only such laws that apply to these areas which were formerly owned by the Lower Brule Sioux Tribe and its members" (Pet'r Tr. Br. App. JJ, at 5) addressed lands on the Lower Brule Sioux Reservation, not the Cheyenne River Reservation. More importantly, that view was based on

4. The State's primary argument (Pet. Br. 13-30) is that this Court in *Montana v. United States*, 450 U.S. 544 (1981), established a general rule of federal common law that an Indian tribe has no regulatory authority over nonmembers on lands not owned by the tribe, and that Justice White's partial plurality opinion in *Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation*, 492 U.S. 408 (1989), reaffirmed that rule. According to the State, the effect of that rule is to reverse the ordinary presumption governing claims that Congress abrogated a tribal treaty right. Congress's failure expressly to reaffirm the tribe's treaty rights becomes, under the State's view, a conclusive presumption that Congress overrode those rights.

In our view, the State is mistaken. In *Montana*, this Court held that the Crow Tribe did not retain authority to regulate nonmember hunting and fishing on its reservation on fee lands that were alienated to nonmembers pursuant to the General Allotment Act (the Dawes Act), ch. 119, 24 Stat. 388, and related legislation. In its analysis, the Court noted that the Tribe "arguably" obtained by treaty a right to regulate on-reservation hunting and fishing by nonmembers, but the Court held "that treaty rights with respect to reservation lands must be read in light of the subsequent alienation of those lands." 450 U.S. at 558-559, 561. In *Montana*, the lands at issue were subsequently alienated to nonmembers of the Tribe—not, as here, to the United States—and the alienation took place pursuant to two allotment acts, which had as their intention "the dissolution of tribal affairs and jurisdiction." 450 U.S.

the premise "[t]hat the lands acquired by the United States were severed from the Lower Brule Sioux Reservation and that the external boundaries of that reservation were reduced and diminished by the extent of the lands so acquired." *Ibid.* That premise turned out to be erroneous as to the Lower Brule Sioux Reservation, see *Lower Brule Sioux Tribe v. South Dakota*, 711 F.2d 809 (8th Cir. 1983), cert. denied, 464 U.S. 1042 (1984), and it is erroneous as to the Cheyenne River Reservation, see Pet. App. A96-A112.

at 560 n.9. The Court was thus unable to find continued jurisdiction over nonmember hunting and fishing in *Montana* because to do so would have been inconsistent with Congress's intent in the allotment acts ultimately to eliminate tribal government itself by permitting lands gradually to be alienated out of federal and tribal ownership, to nonmembers who would not be subject to tribal authority.¹⁰

This Court in *Montana* accordingly did not depart from the general rule disfavoring implied abrogation of Indian treaty rights. Instead, in conformity with that general rule, the Court found that the treaty rights in question there were inconsistent with—and thus had plainly been abrogated by—the statutes under which the land had been alienated. Far from establishing a reverse presumption favoring abrogation of treaty rights, *Montana* reached the conclusion that the treaty rights were abrogated only after consideration of Congress's manifest purpose in providing for the alienation of the lands at issue.

That understanding of *Montana* was emphasized by the partial plurality opinion of Justice White in *Brendale*, on which the State heavily relies. That opinion noted the Court's statement in *Montana* that treaty rights with respect to given lands must be "read in light of the subsequent alienation of those lands." 492 U.S. at 422. The opinion then observed that the lands at issue in *Montana*, as in *Brendale*, had been alienated under the General

¹⁰ Congress later reversed course and decided that tribal governments should be protected. See *County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation*, 112 S. Ct. 683, 686-687 (1992). But "Congress made no attempt to undo the dramatic effects of the allotment years on the ownership of former Indian lands" and did not "encumber [the] fee-patented lands [or] impair[] the rights of those non-Indians who had acquired title to over two-thirds of the Indian lands allotted under the Dawes Act." *Id.* at 686-687. The change of policy thus did not alter the conclusion that nonmembers who acquired the allotted lands remained free of general tribal jurisdiction. See *Montana*, 450 U.S. at 560 n.9.

Allotment Act. 492 U.S. at 423. Under the State's view, the mere fact that the land had been alienated under the Allotment Act—indeed, the mere fact that it had been alienated, regardless of the circumstances—would have been sufficient to resolve the case.

The *Brendale* partial plurality opinion, however, did not find the fact of alienation alone sufficient to account for the result. Instead, the opinion explained that the Court in *Montana* "concluded that '[i]t defies common sense to suppose that Congress would intend that non-Indians purchasing allotted lands would become subject to tribal jurisdiction when an avowed purpose of the allotment policy was the ultimate destruction of tribal government.'" 492 U.S. at 423 (quoting *Montana*, 450 U.S. at 560 n.9). The partial plurality opinion in *Brendale*, like the Court's opinion in *Montana*, thus is fully consistent with the well-settled principle that a claim of statutory abrogation of a treaty right must be resolved through careful analysis of the statute involved to determine whether there is "clear evidence that Congress actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other, and chose to resolve that conflict by abrogating the treaty." *United States v. Dion*, 476 U.S. 734, 740 (1986). Neither the Court in *Montana* nor the partial plurality in *Brendale* minted a new rule of federal common law applicable to all lands alienated by a tribe, unanchored to the specific statutory authority for (and qualifications on) the alienation or the circumstances under which the alienation occurred.

The former trust lands that the Tribe seeks to regulate in this case were alienated pursuant to the Cheyenne River Oahe Act, not the allotment acts that formed the basis for the decision in *Montana*. By 1954, when the Cheyenne River Oahe Act was passed, the allotment regime had given way to the new policy introduced by the Indian Reorganization Act of 1934, ch. 576, 48 Stat. 984, of encouraging "tribal self-determination and self-govern-

ance." *County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation*, 112 S. Ct. 683, 686 (1992); see *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 152 (1973); F. Cohen, *Handbook of Federal Indian Law* 216 (1942). In light of that sea change in federal Indian policy, it would be anomalous to interpret post-1934 legislation such as the Cheyenne River Oahe Act as if it had been enacted as part of the attempt to eliminate tribal government characteristic of the allotment era.¹¹

The specific provisions of the Cheyenne River Oahe Act bear out the absence of any congressional intent in passing that Act to abrogate the Tribe's treaty rights.

¹¹ The State argues (Pet. Br. 31-32) that, when it passed the Cheyenne River Oahe Act, Congress had already moved away from its policy of encouraging tribal governance and had enacted legislation aimed at ultimate termination of federal responsibility for Indian tribes. Insofar as that policy had gained dominance by 1954, however, it was implemented not through a wholesale effort to end all tribal sovereignty, but through specific legislation explicitly terminating federal authority over specified reservations when, in Congress's view, such action was appropriate. See, e.g., *Menominee Tribe of Indians v. United States*, 391 U.S. 404, 408-410 (1968) (discussing provisions of Menominee Tribe Termination Act of 1954). The Cheyenne River Oahe Act contains not a word suggesting that ultimate termination of federal responsibility for the Tribe was envisioned; to the contrary, the Act grants the Tribe and its members substantial continuing rights on the former trust lands. It therefore cannot be interpreted as a termination act. The only evidence the State is able to muster to the contrary (Pet. Br. 32-33) are highly ambiguous statements by a single congressman, a Department of the Interior official, and the Tribe itself that suggest at most that the Tribe might be ready "in a period of possibly 10 or 15 years" for termination of federal supervision. 100 Cong. Rec. 13,160 (1954). None of those statements suggests that anyone believed that the Cheyenne River Oahe Act itself provided for termination of federal responsibility for the Tribe. Finally, as the court of appeals correctly noted (Pet. App. A9 n.7), the termination policy of the 1940s and 1950s "was aimed more at terminating the federal government's role in Indian affairs than at terminating tribal sovereignty." See R. Strickland, et al., *Felix Cohen's Handbook of Federal Indian Law* 152-180 (1982).

As both courts below found, Congress's purpose was to build a dam and reservoir, not to effect a change in Indian governance. Moreover, the specific provisions of the Cheyenne River Oahe Act suggest that Congress intended to permit continued use of the lands by the Tribe and its members so far as it would be consistent with the construction and operation of the dam and reservoir. Because the analogy between the purposes and provisions of the Cheyenne River Oahe Act and the allotment acts of the late nineteenth and early twentieth century fails, the Court's conclusion in *Montana* and, in part, *Brendale*, is inapplicable in this case.

Finally, the circumstances surrounding the alienation of the land in this case are entirely different from those that surrounded the allotment acts under which the lands at issue in *Montana* and *Brendale* were alienated. Cf. *Solem v. Bartlett*, 465 U.S. 463, 471-472 (1984). Unlike in *Montana* and *Brendale*, no non-Indians settled on the taken lands, and thus no non-Indians acquired, with their fee titles to the land, any interest in an ability to use their private property outside the constraints of tribal jurisdiction. Accordingly, the court of appeals' finding that Congress did not abrogate the Tribe's treaty right to regulate hunting and fishing by nonmembers on the former trust lands is entirely consistent with this Court's decision in *Montana* and with the partial plurality opinion in *Brendale*.

B. The Cheyenne River Oahe Act Did Not Divest The Tribe of Its Inherent Power As Sovereign To Regulate Hunting And Fishing On The Former Trust Lands

1. Quite apart from the rights granted to the Tribe under the 1868 Fort Laramie Treaty, the Tribe's inherent rights as sovereign provide an independent basis for its authority to regulate nonmember hunting and fishing within its Reservation on the former trust lands.

It is a fundamental principle of federal Indian law that Indian tribes enjoy "inherent powers of a limited sovereignty which has never been extinguished." *United States v. Wheeler*, 435 U.S. 313, 322 (1978) (quoting F. Cohen, *Handbook of Federal Indian Law* 122 (1942)) (emphasis omitted). See *United States v. Mazurie*, 419 U.S. 544, 557 (1975); *Talton v. Mayes*, 163 U.S. 376, 380-381 (1896); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 547-549 (1832). Those powers remain unless they are "withdrawn by treaty or statute, or by implication as a necessary result of [the tribe's] dependent status." *Wheeler*, 435 U.S. at 323.

Among the sovereign powers retained by the Tribe here, at least prior to 1954, was the authority to regulate hunting and fishing on all Indian lands within the Reservation. Because "the sovereignty retained by the Tribe under the Treaty of [1868] include[d] its right to regulate the use of its resources by members as well as nonmembers," *New Mexico v. Mescalero Apache Tribe*, 462 U.S. at 337, the Tribe could "limit[] or forbid[] non-Indian hunting and fishing on lands * * * owned by or held in trust for the Tribe or its members." *Montana v. United States*, 450 U.S. at 566-567.¹²

A claim that Congress has by implication divested a tribe of aspects of its inherent powers as sovereign is subject to an analytical framework similar to a claim that Congress has by implication abrogated a tribe's treaty rights. To be sure, a tribe may not exercise any power that is in conflict with federal law or that is otherwise necessarily inconsistent with its status as a

¹² As the district court noted, "[b]eginning with the passage of the Indian Reorganization Act * * *, the Tribe enacted ordinances, promulgated under the authority of Article VII of the Tribal By-Laws and approved by the Bureau of Indian Affairs (BIA), which required nonmembers to obtain a tribal permit to hunt or fish on the reservation." Pet. App. A73.

dependent sovereign; to that extent, a tribe may be divested of aspects of its inherent sovereign authority even absent an express congressional statement. See, e.g., *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 204, 208 (1978). Beyond that, however, "a proper respect both for tribal sovereignty itself and for the plenary authority of Congress in this area cautions that [a court should] tread lightly in the absence of clear indications of legislative intent." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 60 (1978); see also *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 149-152 (1982); *Bryan v. Itasca County*, 426 U.S. 373, 392-393 (1976).

As we have explained above (pages 15-16, *supra*), nothing in the Cheyenne River Oahe Act suggests that Congress intended to divest the Tribe entirely of its pre-existing right to regulate nonmember hunting and fishing within the Reservation on the taken lands. A proper respect for tribal sovereignty and for Congress's primary role in this area therefore requires that, unless the exercise of the Tribe's authority would be inconsistent with its status as dependent sovereign, the Tribe's continuing right after 1954 to exercise the authority at issue in this case should be recognized.

2. The State argues (Pet. Br. 17-18) that *Montana* and the partial plurality opinion in *Brendale* establish a general rule that a tribe has no inherent sovereign powers over nonmembers on land not owned by the tribe. For this reason, it continues, the clear statement rule ordinarily applicable to a divestiture of inherent tribal sovereign powers is not applicable to this case. That contention is mistaken.

In *Montana*, this Court explained "that the dependent status of Indian tribes within our territorial jurisdiction is necessarily inconsistent with their freedom independently to determine their external relations." 450 U.S. at 564 (quoting *United States v. Wheeler*, 435 U.S. at 326). The Court went on to conclude that the tribe had no inherent rights as sovereign to regulate "hunting and

fishing by nonmembers of a tribe on lands no longer owned by the tribe" because such regulation "bears no clear relationship to tribal self-government or internal relations." 450 U.S. at 564. See also *Brendale*, 492 U.S. at 425-428.

The Court's discussion in *Montana* must be read in the context of the circumstances of that case, which involved lands that had been alienated in fee to non-Indians—not to the United States—and where that alienation took place under the regime of the allotment acts. As the Court had already made clear in the earlier portion of the opinion in *Montana*, discussed above, it would have been inconsistent with the congressional purpose underlying the allotment acts to recognize continued general tribal sovereign authority over nonmembers who settled on fee lands that were alienated under those acts. In that setting, the relationship between the tribe and nonmember owners of the fee lands may aptly be characterized as an "external relation" of the tribe, since the nonmember owners had a reasonable expectation, entirely in accord with Congress's purpose, that they (and their invitees) would ordinarily be subject to state jurisdiction, not tribal jurisdiction, once they acquired the land. To put the point another way, it would have been inconsistent with the tribe's status as dependent sovereign for it to exercise authority that was inconsistent with an enactment of the United States, the superior sovereign.

An entirely different conclusion follows, however, with respect to the lands at issue in this case. Those lands were not alienated to private individuals (who might thereby obtain reliance interests in being free of tribal jurisdiction), but to the United States. Given the extensive involvement of the United States in matters occurring on Indian reservations and the United States' special responsibility toward Indian tribes, the acquisition of land by the United States for a federal purpose in a manner that is expressly designed to minimize the

impact on the Tribe and to restore its economic, social, and community relations (see page 4, *supra*) scarcely implies a *divestiture* of tribal jurisdiction. Moreover, the nonmembers whose conduct the Tribe seeks to regulate here are transient hunters and fishers, whose limited access to the land derives solely from (and is subject to regulation under) the federal statutes governing the federal project. They are not landowners who seek to use their own private property as they wish, in accordance with the state law that presumptively governs the use of such land generally. Conversely, although the tribes in *Montana* and *Brendale* had lost all rights in and to the use of the fee lands, the Cheyenne River Sioux Tribe was not entirely divested of its rights to use the former trust lands. It retains very substantial property interests in those lands.¹³

In sum, Congress's purpose in providing for alienation of the land—construction and operation of a dam and reservoir—is generally consistent with continued tribal sovereignty over activities taking place on the land. Because "Indian tribes retain 'attributes of sovereignty over both their members and their territory,'" *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. at 14 (quoting *United States v. Mazurie*, 419 U.S. at 557), the Tribe's loss of a property interest in reservation lands does not, without more, divest the Tribe of sovereign authority

¹³ Indeed, even if *Montana* and the partial plurality opinion in *Brendale* were read to draw a sharp line between tribal authority over nonmembers on "Indian" lands and tribal authority over nonmembers on "non-Indian" lands it is not clear on which side of the line the lands at issue here would fall. To be sure, the former trust lands are no longer owned entirely for the benefit of the Tribe. But the Tribe and its members retain very substantial interests in those lands (unlike the fee lands at issue in *Montana* and *Brendale*), and those interests plainly predominate over the transient interests of non-Indians to enter the lands for limited purposes.

over that territory.¹⁴ See *Merrion v. Jicarilla Apache Tribe*, 455 U.S. at 145-146; see also *Powers of Indian Tribes*, 55 Interior Dec. 14, 50, 55 (1934). Accordingly, except insofar as Congress expressly limited the Tribe's sovereign authority in the Cheyenne River Oahe Act or other applicable federal law, the Tribe retains its inherent authority over the former trust lands.

II. THE STATE'S CHALLENGE TO THE REMAND ORDER SHOULD BE REJECTED

The State and amici Montana, *et al.*, urge review of the court of appeals' remand order to the district court with respect to the former fee lands that the United States acquired from non-Indians in 1954. The court of appeals noted that the district court had attempted to determine whether non-Indian hunting and fishing on the taken area as a whole (including both former fee and former trust lands) came within either of the exceptions to the rule barring tribal jurisdiction over fee lands stated in *Montana*—namely, where the non-Indian enters into a consensual relationship with the Tribe or its members or where the non-Indian's "conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." 450 U.S. at 566. The court of appeals, however, treated the former trust lands and the former fee lands separately, finding that the Tribe may regulate nonmember hunting and fish-

¹⁴ The State attempts (Pet. Br. 24-25) to justify a rule that would divest tribes of all authority over nonmembers who do not consent to tribal authority by pointing to the fact that nonmembers have no voice in setting tribal policy. But the State is surely wrong in suggesting that hunters and fishers must have a voice in the making of regulations in whatever jurisdiction they choose to conduct their activities. Whatever the validity of that rationale with respect to nonmembers who live within a reservation, it has little relevance to the facts of this case.

ing on the former trust lands but that the Tribe's authority to do so on the former fee lands depends on the application of the *Montana* exceptions. The court therefore remanded the case to the district court for it to conduct a fresh inquiry concerning the application of the *Montana* exceptions, this time limited to the former fee lands. Pet. App. A46.

Although we recognize that the Tribe did not cross-petition on this issue, we doubt that the *Montana* exceptions provide the appropriate analysis of the former fee lands in this case. Once those lands were acquired by the United States, they lost their character as private, non-member holdings, and the rationale for prohibiting tribal jurisdiction over nonmembers on those lands disappeared.¹⁵ In any event, the State's arguments that the remand was mistaken (Pet. Br. 47-49) essentially mirror its arguments that the court of appeals' decision regarding the former trust lands was mistaken. For the reasons given above, the court of appeals correctly decided the issue of tribal jurisdiction on the former trust lands. There accordingly is no reason to disturb the court of appeals' remand as to the former fee lands, which will at least enable the district court to reconsider the application of the *Montana* exceptions in light of the Tribe's interests in and regulatory authority over the former trust lands.¹⁶

¹⁵ Indeed, Section 5 of the Indian Reorganization Act, 25 U.S.C. 465, provides for reacquisition of fee lands and their reconveyance to the Tribe. There is no reason to treat lands reconveyed pursuant to that provision as fee lands for purposes of determining whether the *Montana* rule generally prohibiting tribal jurisdiction applies. Similarly, there appears to be no reason to treat the former fee lands in this case as exempt from tribal jurisdiction.

¹⁶ Citing the partial plurality opinion in *Brendale*, 492 U.S. at 431, the State suggests (Pet. Br. 49) in passing that the Tribe would not have regulatory jurisdiction over the former fee lands even if the *Montana* exceptions were satisfied here, but would instead have only a cause of action in federal court to protect against the threat to its interests. That issue is premature, because it

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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would arise only if the district court finds on remand that the Tribe can make the necessary *Montana* showing as to the former fee lands. In any event, the Court in *Brendale* did not adopt the partial plurality's views on this point. See 492 U.S. at 444 (opinion of Stevens, J.); *id.* at 460 (opinion of Blackmun, J.). And the plurality's views themselves were stated in the context of a zoning dispute, not regulation of hunting and fishing. The Tribe can hardly be expected to protect its interests by filing a federal lawsuit against every transient hunter or fisher whose conduct threatens the Tribe's interests. This case therefore would appear to be governed by the plain language of the Court's opinion in *Montana*, which did involve regulation of hunting and fishing. See 450 U.S. at 566 ("[a] tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe").

No. 91-2051

Supreme Court, U.S.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

STATE OF SOUTH DAKOTA IN ITS OWN BEHALF,
AND AS PARENS PATRIAE,

Petitioner,

v.

GREGG BOURLAND, PERSONALLY AND AS CHAIRMAN
OF THE CHEYENNE RIVER SIOUX TRIBE AND DENNIS
ROUSSEAU, PERSONALLY AND AS DIRECTOR OF CHEYENNE
RIVER SIOUX TRIBE GAME, FISH AND PARKS,

Respondents.

On Writ Of Certiorari to the United States
Court of Appeals for the Eighth Circuit

BRIEF ON THE MERITS OF AMICUS CURIAE
INTERNATIONAL ASSOCIATION OF FISH
AND WILDLIFE AGENCIES
IN SUPPORT OF PETITIONER

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BRIEF ON THE MERITS OF AMICUS CURIAE
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AND WILDLIFE AGENCIES
IN SUPPORT OF PETITIONER

The International Association of Fish and Wildlife
Agencies, having obtained written consent of all parties
to the case as required by Rule 37.3, submits this brief
on the merits in support of petitioner State of South
Dakota.

INTEREST OF AMICUS CURIAE

The International Association of Fish and Wildlife Agencies ("the International Association") is a District of Columbia not-for-profit corporation dedicated to coordinating the efforts of public administrative agencies responsible for the protection and management of the fish and wildlife of North America. Founded at Yellowstone National Park in 1902, the International Association numbers among its government members the fish and wildlife agencies of all fifty states, the Commonwealth of Puerto Rico, and of nine provinces and territories of Canada.

The analysis applied by the court of appeals to construe the Cheyenne River Taking Act, Pub. L. 83-776, 68 Stat. 1191 (1954), defeats the intent of Congress by means of a rule which denies effect to the implications of the statute. The State of South Dakota has invested more than thirty years of intensive fisheries management in the Oahe Reservoir. Management activity has included stocking and introduction of fish species, monitoring of fish populations and population dynamics, management for forage fish, and water quality studies. Application by the State of a full array of management practices has resulted in a high quality, nationally recognized fishery at the Oahe Reservoir. The State has enforced laws designed to protect this fishery including season limitations, bag limits, and legal methods of take. Tribal members residing near the reservoir have enjoyed access, without charge, to this enhanced fishery. Application of the *Bourland* analysis could affect state authority to regulate tribal nonmember hunting and fishing on thousands of acres of land taken for public flood control purposes in North

Dakota and South Dakota. Such areas are regarded as public areas open to hunting and fishing by tribal nonmembers, subject to regulation by the state.

STATEMENT OF THE CASE

Prompted by severe floods that devastated the lower Missouri River basin states in 1942, 1943 and 1944 and by the desires of upper basin residents for storage of water for irrigation, Congress in the Flood Control Act of 1944, Pub. L. 78-534, 58 Stat. 887, authorized a series of dams in the upper basin. The Oahe Reservoir is one of six main-stem reservoirs on the Missouri River constructed, operated and maintained by the Corps of Engineers. The reservoir is "under the direction of" the Secretary of the Army. *ESTI Pipeline Project v. Missouri*, 484 U.S. 495, 505 (1988). Section 4 of the Flood Control Act of 1944 provides for public use of water areas suitable for public park and recreation purposes, but no use of any such area shall be permitted "which is inconsistent with the laws for the protection of fish and game of the State in which such area is situated." 16 U.S.C. § 460d. The Secretary of the Army is authorized to acquire lands for authorized projects pursuant to section 3 of the Flood Control Act of 1944. 33 U.S.C. § 701c.

Three of the earth fill dams built by the Corps across the Missouri River, the Garrison, the Oahe and the Fort Randall, flooded Indian lands on five Indian reservations in North Dakota and South Dakota. Damage to Indians of Five Reservations, Bureau of Indian Affairs, Missouri River Basin Investigations Project, Report No. 138, April 1954, 25 (hereinafter "MRBI

Report"), Trial Appendix BB. The site of the Oahe Dam is about six miles northwest of Pierre, South Dakota. The reservoir created by the impoundment extends for approximately 250 miles along the Missouri River from the Oahe Dam to the vicinity of Bismarck, North Dakota, flooding lands along the eastern boundaries of the Standing Rock and Cheyenne River Reservations and for miles up western tributaries of the Missouri. MRBI Report at 25, Trial Appendix BB.

Public Law 870, Approved September 30, 1950. In 1949, legislation was introduced to authorize the Chief of Engineers to negotiate separate contracts with the Sioux Indians of the respondent Cheyenne River Sioux Tribe in South Dakota and with the Sioux Indians of the Standing Rock Reservation in South Dakota and North Dakota for Indian lands and rights acquired by the United States for the Oahe Dam and Reservoir. As ordered reported on July 13, 1949, H.R. 5372, 81st Cong., directed the Chief of Engineers jointly with the Secretary of the Interior to negotiate contracts, containing provisions outlined in the bill, with representatives of the tribes. The contracts were to "convey to the United States the title to all tribal, allotted, assigned, and inherited lands or interests therein belonging to the Indians of each tribe required by the United States for the reservoir" to be created by the Oahe Dam. Under section 2 of the bill as reported, the contracts were to:

* * *

(d) provide for the preservation of any treaty rights of the tribe in regard to fishing, hunting, and trapping, insofar as may be practicable under the physical conditions existing when the Oahe project is completed;

and

(e) provide for nonexclusive access rights to the Oahe Reservoir and for the reservation to the said Indians of the use of the land between the water line and the taking line insofar as the same may be consistent with the operation and control of the Oahe project.

§ 2(d), (e), H.R. 5372, 81st Cong., 1st Sess. (1949) (Union Calendar No. 429). H.R. 5372 was a substitute bill recommended by the Secretary of the Interior in lieu of H.R. 3582. In a departmental report occupying four pages of the House report, Interior Secretary Oscar L. Chapman advised Congress that construction of the Oahe Dam and Reservoir would cause serious losses to the Cheyenne River and Standing Rock Indians, that the Missouri forms the east boundary of the two reservations, and that much of the best land on the reservations is located along the river bottoms and back for some distance from the mouths of tributary streams. The department report declared that practically all of the river bottom land would be inundated, amounting to approximately 95,500 acres on the Cheyenne River Reservation. H. Rep. No. 1047, 81st Cong., 1st Sess. 3 (1949). In fact, more than 100,000 acres were eventually taken by Congress.

Secretary Chapman's report drew to the attention of the Committee that "Indians of both reservations would lose valuable wildlife resources and recreational areas." H. Rep. No. 1047, at 4. The department report explained:

On the Cheyenne River Reservation, over 400 deer are estimated to live year long in the timbered area which will be inundated. In the bottoms area, pheasants, rabbits and raccoons are numerous. Several hundred bank-denning beaver are annually taken from the same area.

Wildlife which provides important feed for over 100 families will be lost. On the Standing Rock Reservation Thus on both reservations, valuable recreational areas used for trapping and hunting will be lost. Fishing is not important on either reservation at the present time.

H. Rep. No. 1047, at 4-5. In view of the effect of the Oahe project on the two reservations, the Secretary's report observed that a fair and proper settlement with the Indians should encompass certain objectives including compensation of the Indians, tribally and individually, for their tangible as well as intangible losses. The Secretary also recommended that the Committee "adjust the Indians' fishing, hunting, and trapping rights, established by treaty, to the new conditions which will be created after the flooding of Oahe Reservoir." H. Rep. No. 1047, at 5. The departmental report enclosed a substitute draft similar to the House and Senate bills (H.R. 3582 and S. 1488) containing language "(d) for protecting Indian treaty rights in relation to hunting, trapping and fishing." H. Rep. No. 1047, at 6.

The House Committee on Public Lands accepted Secretary Chapman's recommended substitute, amending it in committee to add a new subsection (g) to section 2 providing that the contracts made jointly by the Chief of Engineers and the Secretary of the Interior shall "provide for the final and complete settlement of all claims by the Indians and tribes described in section 1 of this Act against the United States arising because of construction of the Oahe project." H. Rep. No. 1047, at 1. The bill as reported passed the House without

further amendment on August 1, 1949. 95 Cong. Rec. 10494 (August 1, 1949).

Hearings in the Senate on H.R. 5372, as passed by the House, were held before a subcommittee of the Committee on Interior and Insular Affairs. Senator Mundt of South Dakota explained that, without an authorization from Congress, the tribes "have no way of making a settlement with the Government unless the Government is empowered to negotiate with them on some basis so that a recommendation can be brought back to Congress." Hearing on H.R. 5372 Before a Subcomm. of the Senate Comm. on Interior and Insular Affairs, 81st Cong., 2d Sess. May 10, 1950, 11 (hereinafter "1950 Senate Hearing"), Trial Appendix M. Such a procedure, according to Senator Gurney, was preferable to the earlier settlement with the Fort Berthold Indians, a settlement brought directly to the Appropriations Committee, by-passing the Interior Committee (the legislative committee) and "because of the trouble and the long-winded arguments that lasted two years to my knowledge before the Appropriations Committee, we thought in preserving the Indian rights that we should get a little better system" 1950 Senate Hearing at 12, Trial Appendix M.

That the negotiations being authorized by Congress in 1950 were intended to provide for a complete settlement of all tribal claims was brought out in committee discussion of an objection raised by the Bureau of the Budget. A BOB letter to the committee addressed a companion bill, H.R. 3582, which made provision in section 6(h) thereof for considering, in the Cheyenne River and Standing Rock contracts, "compensation for

all breaches of treaty rights." BOB objected to the provision, believing that the Indian Claims Commission was the proper forum for such matters. The BOB stated: "It would be appropriate, in our opinion, to have this question [breaches of treaty rights] considered through proper channels, rather than to thrust that responsibility upon an investigatory group." S. Rep. No. 1737, 81st Cong., 2d Sess. 8 (1950).

Examining the witness D.S. Myer, Commissioner of Indian Affairs, the Subcommittee Chairman, Senator McFarland, inquired:

Senator McFarland. Well, Mr. Myer, why should they not negotiate the matter of treaty provisions here if it is their desire to do so?

Mr. Myer. I have not had the opportunity, Mr. Chairman, to know what the reasons were that lay behind the Bureau of the Budget's statement. This letter came to my attention last night. The only information I have on it is the fact that they have made this statement.

Senator McFarland. Well, I do not mean in regard to other matters, but as far as this matter is concerned, it should be all-inclusive. When they negotiate a contract, it should include everything.

That is the thing that some of us have not liked about some of these things, that the Indians never get their business wound up. It has just come back and come back and they hire lawyers, go before Indian Commissions and everything else. Now if you are going to negotiate a contract, let us make it a contract. Let us finish it up.

1950 Senate Hearing at 41, Trial Appendix M. Counsel to the Indian Commissioner, Mr. Flickinger, observed

that "This bill contemplates that everything will be wrapped up into one package." *Id.* at 42.

Senator McFarland. Well, why make an exception to the breaking of the treaty in this regard?

* * *

Senator Gurney. If I might interrupt, Mr. Chairman, on page 4 of the bill, line 21, it says, "provide for the final and complete settlement of all claims by the Indians and tribes of these two reservations against the United States arising because of the construction of the Oahe project."

* * *

Senator Mundt. Mr. Chairman, if I may interpolate, that is important because these Indians are part of the Sioux Nation, and among other treaty rights which are under dispute and now before the Claims Commission, for example, are treaty rights involving the Black Hills and the Home State Gold Mine. Well, obviously, this bill does not want to get into something like that. That will be presented to the Claims Commission.

1950 Senate Hearing at 42-43, Trial Appendix M.

Mr. Flickinger also explained to the committee that if an individual Indian is not satisfied with the value of lands allotted to him, provision is made for a proceeding in federal court to determine the value of the particular tract, but that many of the elements to which an Indian is entitled by treaty rights would not be compensable in ordinary condemnation proceedings.

Senator McFarland. Of course I think generally speaking the Indian gets more by negotiation than he would by court action.

Mr. Flickinger. I think that is true, and the court action would not take care of many of the elements which he is entitled to by reason of his treaty rights and other relationships of Government toward the Indian.

Senator Anderson. For instance?

Mr. Flickinger. Well, many of the intangibles probably would not be provided for.

Senator Anderson. Well, for instance?

Mr. Flickinger. Paying for the removal to new lands, the location of the new lands and the adjustment of these items which are contained in the act.

Senator Anderson. Why could not the court take that into consideration?

Mr. Flickinger. They could if the act of Congress authorized that, but in ordinary condemnation proceedings many of those elements would not be included.

1950 Senate Hearing at 48-49, Trial Appendix M. Through its counsel J.W. Kimbel, the Office of Chief of Engineers objected to the "payment of compensation beyond relocation and land costs such as provision for the fulfillment of treaty obligations, re-establishment of economic, social and religious life and similar intangibles." 1950 Senate Hearing at 61, Trial Appendix M. Compensation for such intangibles should, instead, according to the Department of the Army, be the subject of an investigation and report by the Secretary of the Interior.

As reported by the Senate Committee, H.R. 5372 did not contain the treaty preservation language of section 2(d) of the Interior Department's substitute, viz., "preservation of any treaty rights of the tribe in regard to fishing, hunting, and trapping, insofar as may be practicable under the physical conditions existing

when the Oahe project is completed." S. Rep. No. 1737, 81st Cong., 2d Sess. 1-2 (1950). And, explaining conference committee action, Mr. Case of South Dakota stated on the House floor:

There is one important change in that a paragraph was added by the conferees which provides for ratification on the part of the tribe in conformance with the provisions of a treaty made many years ago, whereby the ratification of the tribe to cessions of land would have to be by the vote of three-fourths of the adults of the tribe. We believe that it is better to provide that kind of ratification as far as the Indians are concerned, rather than by other methods, so there would be complete accordance with the treaty and not raise any questions later as to the validity of the action. Of course, it is generally recognized that Congress has the plenary power to legislate as it pleases but it ought not to disregard treaty rights once ratified.

96 Cong. Rec. 15609 (September 22, 1950). As to whether the original law which authorized the dams had not required the government to make settlements with everybody whose property is affected, Mr. Case observed:

Mr. Case of South Dakota. The gentleman is partly correct but not entirely so. Under long established interpretations, where water rights were reserved by treaty to Indian tribes the Government cannot settle for them in the normal manner if it comes in and takes the land. Water rights were reserved to the Indians in these cases. Destruction of the tribe's rights on the Missouri River and its tributaries could not be properly compensated for by settlement to individuals for individual tracts of land.

Hunting and fishing rights also were a part of the rights recognized by treaty in 1851 and 1868 and ratified by the Congress. To the extent that these may be impaired or destroyed, the tribe is entitled to compensation apart from settlement with the allottees holding individual tracts of land.

96 Cong. Rec. at 15609. Thereafter, Public Law 870, 64 Stat. 1093 (1950), was enacted authorizing the negotiation of separate contracts with respondent Cheyenne River Sioux Tribe and with the Sioux Indians of the Standing Rock Reservation.

Public Law 776, Approved September 3, 1954. Negotiations with respondent Cheyenne River Tribe under ~~Public Law~~ 870 did not result in an agreement as to price to be paid the tribe for its land and interests therein. The tribe informed government negotiators that, because negotiations as to price for the land had failed, the tribe would not be able to proceed with further negotiations and that the matter would be presented to Congress. Accordingly, the negotiations were concluded on November 26, 1952. H. Rep. No. 2484, 83rd Cong., 2d Sess. 9-10 (1954).

Negotiations under Public Law 870 having failed, a tribal delegation determined that "it was now necessary to report to the Congress on our failure to agree and also to submit to the Congress a bill in the form of an agreement between the United States and the Cheyenne River Sioux Tribe." Oahe, Report of the Washington Delegation, January 21-31, 1953, 2 (hereinafter "Tribal Delegation Report"), Trial Appendix V. The text of the bill prepared by counsel for the tribe was introduced by Senator Case as S. 695, 83rd Cong., and in the House by Cong. Berry as H.R. 2233. Tribal Delegation

Report at 11, Trial Appendix V. Section X of the tribal draft is identical to Section X of Public Law 776, subsequently enacted on September 3, 1954.

Section XI of the tribal draft introduced as H.R. 2233 and S. 695¹ dealt with assistance by the United States to tribal members whose lands are within the taking area. The Department of the Interior was directed to purchase substitute allotments, using funds provided out of monies placed to the credit of the individual involved, and reconvey such lands to the individual under trust patents. According to the tribe's draft of Section XI, "The lands so selected and purchased as substitute allotments may be either within the boundaries of the Cheyenne River Reservation *as diminished by this agreement* or outside said reservation as may meet the desires of the individual involved in the several transactions." (Emphasis added.)

Several days of hearings were held in May 1954 on H.R. 2233 and S. 695 by a Joint Senate and House Subcommittee on Indian Affairs of the Committees on Interior and Insular Affairs. Placed before the Joint Senate-House Subcommittee was the April 1954 report of the Bureau of Indian Affairs Missouri River Basin Investigations Project dealing with damages to Indians expected to arise from the Oahe and Fort Randall Reservoir and Dam Projects

¹ Mr. Sigler, counsel for the Bureau of Indian Affairs (BIA), testified before the Joint Senate-House hearing that when negotiations under Public Law 870 on the value of land broke down, the tribe advised they did not wish to discuss other provisions and would submit their proposal to Congress. "Their proposed agreement has been embodied in this bill that you are considering today." Joint Senate-House Hearing at 157, Trial Appendix RR.

being constructed on the Missouri River by the Corps. According to the MRBI Report,

Because of the special status of Indians in relation to the Federal Government and because of their unique cultural background, Congress has indicated that settlement for takings of Indian land should include funds for relocating families displaced by the reservoirs and for re-establishing and protecting the economic, social, religious and community life of the Indians affected [citing Public Law 870]. Compensation thus was to cover the indirect and intangible as well as the direct damages.

MRBI Report at 2, Trial Appendix BB. The report noted that although full agreement had not been reached on property values, the major item in dispute was the magnitude of secondary costs and losses and intangible damages. Wide differences of opinion, according to the MRBI Report, prevented negotiators from getting within negotiating range on a total settlement price for all properties, costs, losses, and damages growing out of the takings and thus a just settlement eventually would have to be referred to Congress for final decision. MRBI Report at 5. Using a January 1951 study prepared by Fish and Wildlife Service, the MBRI Report estimated an annual loss of wildlife of \$74,300 to the Cheyenne River Reservation as a result of flooding of Indian lands. Table 24, MRBI Report at 78, Trial Appendix BB. Examining Mr. Kimbel, the Corps' witness, the House Subcommittee Chairman and sponsor of H.R. 2233, Mr. Berry,² stated:

² According to Senate Interior Committee Chairman Watkins in executive session, "We have had various types and

Now, if that value, \$74,300 figure is correct, that is almost \$2 million, when computed and capitalized at four percent is it not?

Mr. Kimbel. It may be. I am not qualified to answer that question that quick; that may well be, but let me make this observation on that: Capitalizing gross income is not normally the basis of determining the value of property. If the Congress wants to compensate the Indians on that basis, it is its prerogative to do so, but it is not normally the method used in determining the value of property.

Joint Senate-House Hearing at 68, Trial Appendix U. And, on the Corps' objection that compensating for wildlife loss would constitute double compensation inasmuch as the tribe seeks to reserve hunting and fishing rights, the Chairman stated:

Mr. Berry. And certainly it could not be determined as double, the percentage double, where one feature of the damage is taken out, could it?

Mr. Kimbel. Not exactly but, in effect, what we are saying, Mr. Chairman, is that the Fish life [sic] which would be reserved to the Indians under this bill are worth zero.

Mr. Berry. That is right.

kinds of appraisements. The Indians want a lot more money than the bill I am willing to recommend carries. I do not know, Senator Case is one who has been backing this and Congressman Berry of South Dakota, in the House, Chairman of the Indian Committee, it is in his District. I might say that Senator Mundt is also interested in it." Hearings Before the Senate Committee on Interior and Insular Affairs on H.R. 2233, 83rd Cong. 2d Sess., Executive Session, August 17, 1954, 3, Appendix EE.

Mr. Kimbel. About the hunting rights that they would lose by the taking of this land being worth \$2 million, now you may or may not be correct in that, but if you say the hunting rights that will be reserved in this bill are zero, then why write it into the bill?

Mr. Berry. It is under the treaty of 1868, which reserves it for them. And the bill simply reserves one feature of the 1868 Treaty.

Joint Senate-House Hearing at 68-69, Trial Appendix U.

Testifying for the Bureau of Indian Affairs, Mr. Sigler, Bureau counsel, stated that the negotiations under Public Law 870 came to a stop when the Indians and the Army failed to agree on a figure for direct damage to land. Concerning other provisions of an agreement including indirect damages, the tribe did not wish to continue discussion. According to the witness,

When the Indians and the Army failed to agree on that figure [for direct damage to land], all negotiations stopped. And the Indians indicated that they did not wish to consider the other provisions of the agreement and wish to submit it to the Congress. Their proposed agreement has been embodied in this bill that you are considering today.

Joint Senate-House Hearing at 157, Trial Appendix RR. The bills before the committee, therefore, represented tribal desires on which the parties had failed to reach agreement in the Public Law 870 negotiations.

On the subject of indirect damages, the following exchange occurred between Senate Chairman Watkins and the BIA witness:

Senator Watkins. Do all members living on the reservation participate in some phase of this proposed damage?

Mr. Sigler. The answer is "yes." They will.

Senator Watkins. I thought those that have lands not actually on the river bottom will probably claim some compensation by reason of taking the hunting grounds along the river.

Mr. Sigler. The present owners are individual owners or allottees, and also the tribe has some tribal land, so that the entire tribal membership will benefit from any figure paid for tribal lands.

In addition to that, some of the indirect damages proposed will be for the benefit of the entire tribe; that is, the loss of hunting grounds and so forth.

Joint Senate-House Hearing at 158, Trial Appendix RR.

Finally, tribal counsel Ralph Case drew the Joint Committee's attention to Article XII of the Treaty of April 29, 1868, which provides that no cession of any portion of land shall be of any validity unless the cession is ratified in writing by three quarters of the adult males of the tribe. In order to assure that the United States not take a title that does not conform to the 1868 treaty, counsel for the tribe urged that the 75 percent requirement be observed. Joint Senate-House Hearing at 216-A, Trial Appendix RR. The tribe recommended that the wildlife loss be set at \$1,857,500, based on capitalizing at four percent the \$74,300 annual loss of wildlife resources, as taken from the MRBI Report. Joint Senate-House Hearing at 265-66, Trial Appendix RR.

Tribal counsel Case provided a section-by-section analysis of the provisions of the pending bills drafted by

the tribe. As to Section X, providing access to the shoreline and reservoir to hunt and fish, without cost, subject to regulations governing the corresponding use by other citizens of the United States, tribal counsel observed that the right to hunt and fish is a valuable right which remains in existence. Joint Senate-House Hearing at 289, Trial Appendix RR.

Following the joint hearings, the tribal negotiating committee scaled back the tribal claim for loss of wildlife and wild fruit from \$1,857,500 to \$1,056,750. H. Rep. No. 2484, 83rd Cong., 2d Sess. 5 (1954).

The Interior Department recommended enactment of H.R. 2233 with amendments. In its report to the Committee, it too was of the opinion that the agreement to convey lands to the United States for the Oahe Reservoir would result in diminishing the boundaries of the Cheyenne River Reservation. Commenting on Section XI relating to substitute allotments, Assistant Secretary Lewis stated:

Seventh, it is recommended that Section XI be amended to provide that title to the lands purchased in substitution for allotments or assignments within the taking area be conveyed in restricted fee to the individual Indian owners if the substitute lands are within or adjacent to the Cheyenne River Reservation boundaries as diminished by this agreement

H. Rep. No. 2484, 83rd Cong., 2d Sess. 14 (1954). Just as contemplated by Public Law 870, H.R. 2233 as reported by the House Interior Committee provided in Section 2 for a "final and complete settlement of all claims, rights, and demands of said Tribe or allottees or heirs thereof arising out of the construction of the Oahe

project." Section 2 provided a payment for lands or interests therein of \$2,614,778.95 and a payment of \$3,973,076 for tribal severance damages and for loss of timber, wildlife and wild fruit resources. H. Rep. No. 2484 at 6. Explaining Section 10, the report states simply that "after the gates are closed, the Indians, without cost, shall have grazing rights between the taking line and the reservoir and fish and hunting rights on the reservoir and its shoreline." H. Rep. No. 2484 at 7.

As enacted on September 3, 1954, Public Law 776 was little changed from the tribal draft except in respect of sums paid in final and complete settlement of all claims, rights and demands of the tribe arising out of the Oahe project.

The ballot laid before the adult members of the Cheyenne River Tribe following enactment of Public Law 776 included the following statement in describing the major provisions of the agreement embodied in the enactment:

6. Indians may graze livestock on the _____ of the land not flooded and may hunt and _____ in the taking area without charge.

Trial Appendix HH. Of 1,942 ballots cast, 1,790 or 92 percent were cast for approval of the agreement embodied in Public Law 776.

SUMMARY OF ARGUMENT

I. The court of appeals narrowed the holdings in *Montana v. United States*, 450 U.S. 544 (1981) and *Brendale v. Confederated Tribes and Bands of the Yakima Nation*, 492 U.S. 408 (1989), to mean that

alienation of lands affects tribal jurisdiction only where there exists a clear expression of congressional intention to divest a tribe of regulatory authority. The Eighth Circuit thereby transmuted the general principle of *Montana* and *Brendale* which in fact requires that treaty rights of Indian tribes be read in light of subsequent alienation and, further, that exercise of inherent tribal sovereignty beyond that necessary for tribal self-government depends on express congressional delegation. Avoiding the general principle of *Montana* and *Brendale*, the court of appeals substituted the analysis of *United States v. Dion*, 476 U.S. 734 (1986), thereby neutralizing the implications of acquisition by the United States of lands for construction of the Oahe project and the dedication of such lands to public use in the court's determination that regulatory authority exists in the tribe over lands taken for the reservoir.

II. Even *Dion v. United States*, 476 U.S. 734 (1986), does not authorize a court to avoid the implications of acts of Congress or to fail to give effect to the customary legal incidents implicit in actions taken by Congress. Congress in the Cheyenne River taking act, Pub. L. 83-776, 68 Stat. 1191 (1954), intended a final and complete settlement of all claims arising out of construction of the Oahe project, including breaches of treaty rights necessitated by the taking. Congress compensated the tribe for wildlife losses and reserved in Section X a non-exclusive right in the tribe to hunt and fish on the taken lands. If the tribe's sovereign right to regulate on the taken lands had been left unaffected, it is difficult to understand why a reservation of access would be necessary. The court of appeals did not give

the language of the taking act or its legislative history the "fair appraisal" required. *Oregon Fish & Wildlife Dep't v. Klamath Tribe*, 473 U.S. 753, 774 (1985).

ARGUMENT

I. The Court of Appeals Erroneously Narrowed the Holdings of this Court in *Montana* and *Brendale*, Transmuting the General Principle of Those Cases Concerning Tribal Authority Over Non-Indians Absent Express Congressional Delegation

Montana v. United States, 450 U.S. 544 (1981) and *Brendale v. Confederated Tribes and Bands of the Yakima Nation*, 492 U.S. 408 (1989), teach that treaty rights with respect to reservation lands must be read in light of the subsequent alienation of those lands, 450 U.S. at 561, and that exercise of inherent tribal power beyond what is necessary to tribal self-government depends on express congressional delegation. 450 U.S. at 564. The court of appeals in the instant case narrowed *Montana* and *Brendale*, asserting that tribal regulatory authority over non-Indian fee lands in those cases was found to be abrogated because of an intention by Congress in Allotment Acts to destroy tribal government. In order, therefore, to determine the jurisdiction of the Cheyenne River Sioux Tribe over lands taken for the Oahe Reservoir, the court of appeals decided it must examine the taking act to see if Congress clearly expressed an intention to divest the tribe of regulatory authority over hunting and fishing on the taken area. 949 F.2d at 991. In further support, the court of appeals adds a "*See Dion*" citation. *Id.*

By limiting the holdings in *Montana* and *Brendale* to a basis for the holdings, the court of appeals transmutes their general principle. Subsequent alienation of tribal lands thus is of significance in the court of appeals analysis only if Congress clearly expressed an intent to divest the tribes of regulatory authority, and the lack of an express congressional delegation for tribal authority concerning nonmembers is of no import whatsoever in the Eighth Circuit analysis.

Under *Montana* and *Brendale*, alienation of tribal lands without the impress of a trust may well constitute a *per se* rule in respect of tribal sovereignty over nonmembers but, even if it were not, it is clearly a major factor demanding analysis by a court. Here the court of appeals gave the taking of land for purposes of a great national flood control project no consideration whatever. Had the United States purchased Indian trust allotments or other tribal lands for purposes of reclamation works wholly for the benefit of a tribe, the reading of treaty rights in respect of such alienation may be that such rights are simply not affected. See, e.g., *Regulation of Hunting and Fishing on Wind River Reservation in Wyoming*, 58 Interior Dec. 331, 334-35 (1943). See also *Brendale*, 429 U.S. at 439 (noting that it is inconceivable that Congress would have intended that the sale of a few lots would divest the tribe of zoning authority) (opinion of Stevens, J.). Similarly, if it is clear that, regardless of alienation of tribal lands, it was the intention of Congress to dedicate a reservoir project to Indian use, then inherent rights of self-government might well not be disturbed by the alienation of tribal lands. Here the court of appeals engaged in no such analysis, applying instead a platonic search for

clear congressional intent to divest respondent tribe of regulatory authority over the Oahe Reservoir.

That the Oahe Reservoir is part of a comprehensive federal program to avoid widespread flooding in a major river basin, that the Reservoir is controlled by and under the direction of the Secretary of the Army, *ESTI Pipeline Project v. Missouri*, 484 U.S. 495, 505 (1988), that exclusive tribal rights to use and occupancy of the taken lands no longer exist, that construction, operation and maintenance of the reservoir have been paid for by the general public, that Congress explicitly provided for public use of water areas suitable for public park and recreation purposes, 16 U.S.C. § 460d, and that the Chief of Engineers is directed to give preference to federal, state or local government agencies in leasing or licensing use of project areas so long as the use is for a public purpose, 16 U.S.C. § 460d, are all relevant considerations not entering into the Eighth Circuit analysis. Nor did the court of appeals consider, for this purpose, the provision in 16 U.S.C. § 460d (Section 4 of the Flood Control Act of 1944) that "no use of any area to which this section applies shall be permitted which is inconsistent with the laws for the protection of fish and game in the State in which such area is situated." None of these items was deemed relevant by the court of appeals because none represented "a sufficiently clear expression of an intention to divest tribal regulatory authority on the taken area." 949 F.2d at 992. Perhaps, but each is directly relevant to the *Montana*, *Brendale* principle that treaty rights must be read in light of subsequent alienation of tribal lands. In effect, the court of appeals precluded the operation of *Montana* and *Brendale* and short-circuited the search

for congressional intent, searching instead for the existence *vel non* of special recitations.

II. A Fair Appraisal of the Taking Act and Its Legislative History Indicates That Congress, the Tribe and Federal Agencies Believed That Tribal Regulatory Authority Would Not Continue Over the Taken Area

As stated for the Court by Justice Stevens in *Oregon Fish & Wildlife Dep't v. Klamath Tribe*, 473 U.S. 753, 774 (1985), courts cannot ignore plain language that, viewed in historical context and given a "fair appraisal," clearly runs counter to a tribe's later claims. Moreover, solicitude for Indian tribes does not require courts to avoid the implications of congressional language or refuse to give effect to customary legal incidents implicit in actions taken by Congress. *United States v. Dion*, 476 U.S. 734 (1986), although involving a statute of general applicability in contrast to the instant enactment cast in the form of an agreement with a single tribe, is not to the contrary. Required in *Dion* was clear evidence that Congress considered the conflict between its intended action and treaty rights and chose to resolve the conflict by abrogating the treaty. 476 U.S. at 740.

At no place in the statutory language or in the legislative history of Public Laws 870 and 776 is there an explicit assertion that Congress intended to divest respondent tribe of regulatory authority over nonmembers on the taken area. Yet no one can review the history of Public Laws 870 and 776 without coming away with the conviction that continuation of tribal

regulatory authority over the taken area was completely out of contemplation. There is not the slightest suggestion that any of the players, Congress, federal agencies or the tribe itself, contemplated the reservation of rights other than those expressly reserved. The attempt by the court of appeals to assess congressional intent by formal rules requiring explicit congressional recitations should be rejected by this Court.

The holding in *Dion* involved a law of general applicability and in the context of such a law the *Dion* analysis serves as an appropriate safeguard against the unintended abrogation by Congress of treaty rights. However, in the context of a "complete settlement of all claims, rights and demands" embodied in legislation, the dynamic changes and Congress may indeed intend to affect rights unless they are specifically reserved. No question exists that Congress was aware of the treaties for the legislative history is full of references thereto. Instead the issue is how Congress resolved the conflict between treaty rights and the taking of lands necessary for the Oahe Dam and Reservoir. Amicus curiae International Association believes that the following items clearly manifest the intention of the parties.

Settlement of All Claims. Section II of Public Law 776 stated explicitly that payment to the tribe of \$5,384,014 for lands and interests therein "shall be in final and complete settlement for all claims, rights and demands of said Tribe" arising out of construction of the Oahe project. The amount included both direct and indirect damages including loss of wildlife resources. Hearings Before the Senate Committee on Interior and Insular Affairs on H.R. 2233, 4 (August 17, 1954) (remarks of Chairman Watkins), Trial Appendix EE. A

BOB proposal to remove from the bill compensation for breaches of treaty rights and to send such matters to the Indian Claims Commission was rejected, a paragraph being added to section 2 to make clear that the contract to be negotiated would constitute a complete settlement of all claims by the Indians and tribes against the United States arising because of construction of the Oahe project, not just a payment for land. § 2(e), Public Law 870.

Reservation of Non-Exclusive Access. Section X of Public Law 776 declares that the tribal council and members shall have:

[W]ithout cost, the right of free access to the shoreline of the reservoir, including the right to hunt and fish in and on the aforesaid shoreline and reservoir, subject, however, to regulations governing the corresponding use by other citizens of the United States.

§ X, Pub. L. 776. As in *Dion*, 476 U.S. at 740, it is difficult to understand why Congress would have reserved to the tribe and its members a non-exclusive right of access, a property right, if the overarching sovereign right in the tribe to regulate the taken area were left unaffected. The tribe's explanation of Section X compounds rather than resolves the difficulty. According to respondent, "Because the Tribe's sovereign powers continued unabated after enactment of the Act, the Tribe needed to retain in the Act only the right of access in order to use the resources of the taken area." Opposition to Petition for Writ of Certiorari, 20, n.8. That explanation obviously begs the question. Further, the ordinary incidents of a right of access are that it is a property right. According to the tribe, therefore, its sovereign right to regulate is reserved to the tribe

through the medium of a property right, and a non-exclusive one at that.

The Tribe's Understanding. In a reversal of normal procedure, the bills considered in the 83rd Congress (H.R. 2233, S. 659) were the product of drafting by tribal counsel and constituted the terms of the agreement sought but not attained by the tribe in the Public Law 870 negotiations. Under the usual canon, doubts are resolved against the drafter. Putting that notion aside, certainly the tribe cannot have anticipated that its "sovereign powers would continue unabated after enactment" when its own draft referred in Section XI to "the boundaries of the Cheyenne River Reservation as diminished by this agreement."

Compensation for Loss of Wildlife. According to the report to the Senate and House committees by Interior Secretary Chapman on the bill that became Public Law 870, "Fishing is not important on either reservation at the present time." S. Rep. No. 1737, 81st Cong., 2d Sess. 5 (1950). In consequence, tribal regulatory rights over fishing in the Oahe Reservoir would relate to a fishery established and enhanced by the State which did not even exist at the time of taking. Such an outcome, as stated in *Dion*, does not promote sensible law. 476 U.S. at 746. Because loss of fish was not even considered in the MRBI Report, compensation for wildlife alone was claimed and the gross annual value of big game, upland birds, small game and furbearers taken by the tribe, estimated at \$74,300, was capitalized at \$1.8 million by use of a four percent rate. While the actual compensation set forth for this element in Public Law 776 may have been less, clearly Congress compensated the tribe for loss of wildlife. Had tribal regulatory

rights concerning wildlife continued unabated following enactment, payment for loss in perpetuity of such resources would be inconsistent therewith. *See Oregon Fish & Wildlife Department v. Klamath Tribe*, 473 U.S. 753, 773 (1985). Mr. Berry, Chairman of the House Subcommittee having cognizance of the legislation in the 83rd Congress, put the matter well in explaining to the Corps witness why hunting rights were being paid for while still being reserved in the bill. According to Mr. Berry: "It is under the treaty of 1868, which reserves it for them. And the bill simply reserves one feature of the 1868 Treaty." Joint Senate-House Hearing at 69, Appendix U. The feature reserved by the bill was a non-exclusive right of access.

Throughout the hearings in legislation leading up to Public Laws 870 and 776, it was clear that compensation was being paid for more than title and interests in land. All rights of the tribe were being acquired except those expressly reserved. As for fish and wildlife, a non-exclusive right to hunt and fish, not the sovereign prerogative to regulate hunting and fishing by nonmembers, was reserved. The language of the earlier Interior draft providing for "preservation of any treaty rights of the tribe in regard to fishing, hunting and trapping, insofar as may be practicable under the physical conditions existing when the Oahe project is completed," *supra*, at 4, 10, was dropped by the tribe in the draft legislation presented to Congress and replaced by a non-exclusive right of access to hunt and fish.

CONCLUSION

For the reasons set forth, amicus curiae International Association requests that this Court reverse the ruling of the court of appeals that the Cheyenne River Sioux Tribe possesses civil regulatory jurisdiction over nonmembers on lands and waters acquired in fee by the United States for construction of the Oahe project.

Respectfully submitted,

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Dated: November 19, 1992

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OFFICE OF THE CLERK

In The
Supreme Court of the United States

October Term, 1992

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STATE OF SOUTH DAKOTA IN ITS OWN BEHALF,
AND AS PARENS PATRIAE,

Petitioner,

v.

GREGG BOURLAND, PERSONALLY AND AS
CHAIRMAN OF THE CHEYENNE RIVER SIOUX
TRIBE, AND DENNIS ROUSSEAU, PERSONALLY
AND AS DIRECTOR OF CHEYENNE RIVER SIOUX
TRIBE GAME, FISH, AND PARKS,

Respondents.

-----◆-----
ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

-----◆-----
**BRIEF OF *AMICI CURIAE* STATES OF MONTANA, ALABAMA,
ARIZONA, CALIFORNIA, NORTH DAKOTA, UTAH AND
WASHINGTON IN SUPPORT OF PETITIONER**

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The States of Montana, Alabama, Arizona, California, North Dakota, Utah and Washington, through their respective Attorneys General, respectfully submit a brief *amicus curiae* pursuant to S. Ct. R. 37.2 in support of the petitioner.

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INTEREST OF THE *AMICI* STATES

Each State appearing as an *amicus curiae* has one or more Indian reservations within its boundaries. These reservations were created initially as areas where the affected tribe's members would have exclusive occupancy rights. Subsequent federal legislation, however, has eliminated that exclusivity in most instances. It is thus quite common for substantial amounts of reservation land to be owned not only by nonmembers but also by federal, state and local governments. The complex land ownership and demographic patterns now characterizing many reservations raise difficult questions concerning the extent to which tribes may exercise regulatory authority over the use of those lands by nonmembers. The Court of Appeals' decision, although dealing specifically with hunting and fishing regulation, has far broader civil regulatory implications for the *amici* in their efforts to fashion coherent responses to those questions.

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SUMMARY OF THE ARGUMENT

A tribal right to regulate can have one of two sources: positive federal law or a tribe's retained inherent authority. The Court of Appeals implied from the Fort Laramie Treaty of April 29, 1868, 15 Stat. 635 (1869), a right on behalf of the Cheyenne River Sioux Tribe to regulate non-

Indian reservation hunting and fishing. The Court of Appeals' reasoning, however, ignored the Treaty's literal language which, in relevant part, established only a geographical area in which the Tribe was to have exclusive occupancy rights and effectively expanded traditional, but limited, landowner rights to incorporate notions of tribal sovereignty. No regulatory powers were granted to the Tribe under the Treaty.

Even if the Court of Appeals properly implied a grant of tribal regulatory authority from the Fort Laramie Treaty, that authority emanated from the Tribe's territorial exclusivity right with respect to reservation lands. The Cheyenne River Act, Pub. L. No. 83-776, 68 Stat. 1191 (1954), unambiguously effected a cession of all real property ownership rights, except those relating to mineral estates, to the United States for the purpose of creating a reservoir and adjacent shoreline to which the federal government, not the Tribe, would control access by nonmembers. Under these circumstances, the Court of Appeals' conclusion that a treaty-secured power to regulate non-Indian hunting and fishing continues within the area taken under the Cheyenne River Act runs directly counter to the principle that a lesser included power may not survive the termination of the greater power. *Brendale v. Confederated Tribes and Bands of Yakima Indian Nation*, 492 U.S. 408, 424 (1989); *Montana v. United States*, 450 U.S. 544, 559 (1981).

Determining the scope of inherent tribal authority requires analyzing the status of the two-pronged *Montana* test in light of *Brendale*. The District Court applied the *Montana* test and concluded that, with respect to the tribal lands taken under the Cheyenne River Act and nontribal lands taken under the Flood Control Act of 1944, Pub. L. No. 78-534, 58 Stat. 887, the Tribe's political integrity, economic security, or health or welfare was not imperiled

by the lack of tribal authority over non-Indian hunting and fishing. Should the Court of Appeals' conclusion concerning the existence of a treaty-secured regulatory right and that right's nonabrogation be reversed, the District Court's findings are determinative even if, under *Brendale*, the latter court should have first inquired into whether the affected tribal interests were subject to protection only through nontribal administrative or judicial proceedings. However, if the Court of Appeals' analysis as to the existence and nonabrogation of a treaty-conferred regulatory power is sustained, its remand order with respect to the nonmember land taken under the Flood Control Act should be reversed since, under the reasoning in Justice White's plurality opinion in *Brendale*, the second *Montana* exception provides no basis for rebutting the ordinary presumption that tribes lack inherent authority over nonmember conduct on nontribal lands.

ARGUMENT

A tribal right to regulate can have one of two sources: positive federal law or a tribe's retained inherent authority. A careful analysis of the treaty rights afforded the Cheyenne River Sioux Tribe in the Fort Laramie Treaty of April 29, 1868 ("1868 Treaty"), 15 Stat. 635 (1869), the effect of the Cheyenne River Act, Pub. L. No. 83-776, 68 Stat. 1191 (1954), on those treaty rights, and the extent of the Tribe's inherent sovereign authority requires reversal of the Court of Appeals' judgment.

I. THERE IS NO POSITIVE FEDERAL LAW WHICH PROVIDES AUTHORITY FOR TRIBAL REGULATION OF NON-INDIANS WITHIN THE TAKEN AREA OF THE OAHE RESERVOIR.

A. The 1868 Treaty Does Not Confer Upon the Tribe the Right to Regulate the Hunting and Fishing of Non-Indians Within the Reservation.

The 1868 Treaty created one reservation for various tribes of the Sioux Indians, including the Cheyenne River Sioux Tribe ("Tribe"). In 1889 this reservation was divided into six separate reservations, one of which was set aside for the Tribe. Act of March 2, 1889, 25 Stat. 888. Neither the Treaty nor the 1889 Act expressly provides that the Tribe has the right to regulate any nonmember activity within the Reservation. As a consequence, the Court of Appeals began its analysis where it left off in *Lower Brule Sioux Tribe v. South Dakota*, 711 F.2d 809 (8th Cir. 1983), *cert. denied*, 464 U.S. 1042 (1984). *South Dakota v. Bourland*, 949 F.2d 984, 990 (8th Cir. 1991) (Pet. App. at A-20). In *Lower Brule*, the court held that a federal treaty setting aside a reservation for the use and occupation of a tribe preempted state jurisdiction over Indian hunting and fishing on the reservation and that, when Congress established the Lower Brule Reservation, the Tribe acquired the right to hunt and fish on the reservation free of state law. *Lower Brule*, 711 F.2d at 814-15. The court found that the Fort Randall Act, Pub. L. No. 85-923, 72 Stat. 1773 (1958), and the Big Bend Act, Pub. L. No. 87-734, 76 Stat. 698 (1962), which authorized the acquisition of and payment for tribal and trust lands on the Lower Brule Reservation needed for the Big Bend Dam and Reservoir Project, did not diminish the Lower Brule Reservation or effect an abrogation of the Lower Brule Tribe's treaty right to hunt and fish on the taken lands free of state regulation.

The Court of Appeals below, without pausing to distinguish the different issues presented, applied the same canon of construction used in *Lower Brule*: "[T]ribal rights are abrogated only if Congress 'has clearly expressed its intent to do so[.]'" *Bourland*, 949 F.2d at 990 (Pet. App. at A-22). Its approach necessitated an initial determination of what rights were secured by the 1868 Treaty. This Court recognized in *Montana v. United States*, 450 U.S. 544 (1981), that a territorial exclusivity provision in the Fort Laramie Treaty of May 7, 1868, 15 Stat. 649 (1869), which is identical to language in the 1868 Treaty, accorded the Crow Tribe "the sole right to use and occupy the reserved land, and, implicitly, the power to exclude others from it" and "arguably conferred upon the Tribe the authority to control fishing and hunting on those lands." *Id.* at 554, 558 (emphasis supplied). The Court of Appeals construed this statement in *Montana* as establishing that the 1868 Treaty conferred on the Tribe "an exclusive right to control hunting and fishing on the Reservation" -- a right which it could find abrogated only if "Congress clearly expressed an intent to divest the Tribe of [such] regulatory authority[.]" *Bourland*, 949 F.2d at 991 (Pet. App. at A-24, A-27). The Court of Appeals' determination that the Treaty established a freestanding right to regulate non-Indian hunting and fishing on reservation lands is wrong for two reasons.

First, and most importantly, there is no textual basis for the Court of Appeals' conclusion. The only relevant provision of the Treaty states that reservation lands were set aside "for the absolute and undisturbed use and occupation of the Indians herein named, and for such other friendly tribes or individual Indians as from time to time they may be willing, with the consent of the United States, to admit amongst them." 15 Stat. at 636. No other persons, except specified government officers or

agents, were "ever [to] be permitted to pass over, settle upon, or reside in the territory described in this article, or in such territory as may be added to this reservation for the use of said Indians." *Id.* Rather than constituting ground upon which to pitch a claim for treaty-conferred regulatory power, the territorial exclusivity provision militates foursquare against such a result. It is clear, when negotiated, the Treaty anticipated that non-Indians, other than a select few, would not have access to the reservation and that those who were authorized to enter would be federal representatives over whom the Tribe presumably lacked jurisdiction. See, e.g., *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 16 (1831); *United States v. White Mountain Apache Tribe*, 784 F.2d 917, 919-20 (9th Cir. 1986). Crediting the Court of Appeals' implication of regulatory authority from the territorial exclusivity provision would thus countenance "a glaring inconsistency in the overall Treaty structure" (*Oregon Department of Fish and Wildlife v. Klamath Indian Tribe*, 473 U.S. 753, 770 (1985)).¹

¹This Court has implied certain usufructuary rights from treaties or statutes creating reservations for the exclusive occupancy of Indians. E.g., *United States v. Dion*, 476 U.S. 734, 738 (1986) (hunting and fishing rights); *Winters v. United States*, 207 U.S. 564, 575-77 (1908) (water rights). The Court has never implied, however, a treaty right to regulate nonmembers from a territorial exclusivity or any other provision. See n.2, *infra*. The absence of decisional authority for the latter proposition is not remarkable, since implication of the usufructuary rights was viewed as essential to carrying out reservation purposes and since post-Civil War reservations generally, and specifically the Great Sioux Reservation, were established to insulate tribal members at least for a period sufficient for them to acquire agrarian skills which would facilitate integration into nontribal society. See F. Prucha, *The Great Father* 562-81, 631-40 (1984).

Second, implying the right to regulate nonmember activity from a territorial exclusivity provision such as that in the 1868 Treaty confuses tribal sovereignty principles with ordinary incidents of landownership. As the Court made explicit in *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 145-46 (1982), a tribe's governmental powers are distinct from its capacity as a "commercial partner": "It is one thing to find that the Tribe has agreed to sell the right to use the land and take from it valuable [resources]; it is quite another to find that the Tribe has abandoned its sovereign powers simply because it has not expressly reserved them through a contract."² The mere fact that

²The debate in *Merrion* concerned whether the source of a tribe's inherent power over a nonmember extracting reservation oil and gas pursuant to a tribal lease was premised solely on the right to exclude or on a more broad conception of inherent authority. E.g., 455 U.S. at 142 ("[The] limitation on tribal taxing authority exists not because the tribe has the power to exclude nonmembers, but because the limited authority that a tribe may exercise over nonmembers does not arise until the nonmember enters the tribal jurisdiction. We do not question that there is a significant territorial component to tribal power: a tribe has no authority over a nonmember until the nonmember enters tribal lands or conducts business with the tribe"). This debate continued, in the context of a treaty rather than an Executive Order reservation, in *Brendale v. Confederated Tribes and Bands of Yakima Indian Nation*, 492 U.S. 408 (1989), where Justice Stevens again relied on the power to exclude as the basis for finding tribal regulatory power over certain lands. As in his *Merrion* dissent, Justice Stevens viewed the power to exclude as inherent. *Id.* at 435 ("[e]ven in the absence of a treaty provision granting such authority, Indian tribes maintain the sovereign power of exclusion unless otherwise curtailed"). He nonetheless added that under the 1855 Treaty between the United States and the Yakima Nation, 12 Stat. 951 (1859), this inherent power "was confirmed." *Id.*

(continued...)

governmental action has established a geographical area for exclusive tribal occupancy and, in so doing, created certain protected property interests carries with it no suggestion that such interests were to encompass not only traditional ownership rights but also, by implication, federally-conferred authority to regulate non-Indians entering such area. Thus, while "the right to exclude [others is] 'one of the most essential sticks in the bundle of rights that are commonly characterized as property'" (*Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 433 (1982)), the right to exclude does not in itself give rise to regulatory jurisdiction of the kind sustained below. That jurisdiction, if it is to be found, must be predicated on a tribe's inherent sovereign powers existing independently of the territorial exclusivity provision.

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²(...continued)

Despite his reference to such confirmation, it appears that the regulatory authority found by Justice Stevens to exist with respect to the Brendale property emanated from inherent, not federally-conferred, tribal power since there would exist no reason to confer that which already existed.

B. Even If the Court of Appeals Properly Implied a Right Under the 1868 Treaty to Regulate Non-Indian Hunting and Fishing, This Right Cannot Survive Elimination of the Primary Right to Exclude.

In *Montana* this Court recognized that, even if the territorial exclusivity clause of the second 1868 Fort Laramie Treaty "arguably" conferred regulatory authority on the Crow Tribe, tribal authority "could only extend to land on which the Tribe exercises 'absolute and undisturbed use and occupation.'" 450 U.S. at 559. Nothing in *Montana* supports the notion that, for purposes of determining whether a regulatory right implied from the promise of territorial exclusivity has been abrogated, a clear intention to abrogate the implied right must appear in the legislation or legislative history eliminating the territorial exclusivity entitlement itself. Justice White, in *Brendale v. Confederated Tribes and Bands of Yakima Indian Nation*, 492 U.S. at 424, cited *Montana* for the dual propositions that treaty-secured rights "must be viewed in light of the subsequent alienation of those lands" and that there exists no "power, derived from the power to exclude, to regulate activities on lands from which tribes can no longer exclude nonmembers." Moreover, nothing in *Montana* or its discussion in *Brendale* indicates that the existence of a treaty-secured regulatory power is dependent upon the manner in which the nonmember-owned lands were removed from trust status. The discussion of the Allotment Act statutes in those decisions stems only from the fact that the lands at issue passed out

of the public domain pursuant to statutes adopted during the allotment era.³

The Cheyenne River Act, Pub. L. No. 776, 68 Stat. 1191 (1954) (Pet. App. at A-195), provided for the conveyance to the United States of "all tribal, allotted, assigned, and inherited lands or interest within said Cheyenne River Reservation belonging to the Indians of said reservation" required for the reservoir created by the Oahe Dam. *Id.* (Pet. App. at A-196). Section X of the Act further provided that the members of the Tribe will have "the right of free access to the shoreline of the reservoir including the right to hunt and fish in and on the aforesaid shoreline and reservoir, subject, however, to regulations governing the corresponding use by other citizens of the United States." *Id.* at 1193 (Pet. App. at A-205). No question exists that the Act abrogated the Tribe's right to territorial exclusivity over the taken lands.

³Indeed, the Court's resolution of the streambed ownership with respect to the Big Horn River counsels directly against the Court of Appeals' reading of *Montana*. That issue was relevant because the Crow Tribe sought "to establish part of [its] claim of power to control hunting and fishing on the reservation by asking us to recognize [its] title to the bed of the Big Horn River." *Montana*, 450 U.S. at 550; *see also Brendale*, 492 U.S. at 443 (Stevens, J.) ("we held that the State owned the bed of the Big Horn River and thus rejected the Tribe's contention that it was entitled to regulate fishing and duck hunting in the river based on its purported ownership interest"). To credit the lower court's analysis would mean either that *Montana* did not resolve the issue of the Crow Tribe's power to regulate nonmember hunting and fishing on the Big Horn River or that the equal footing doctrine principles, upon which the streambed ownership question was resolved, have destruction of tribal governance as an important objective -- neither of which propositions is fairly tenable.

Since any possible implied treaty-right to regulate was dependant upon the right to the exclusive use and occupation of reservation lands, abrogation of the primary right to exclusive use and occupation eliminated any lesser included regulatory authority. *Brendale*, 492 U.S. at 424. Indeed, even the Court of Appeals has recognized that "the treaty right to exclusive occupation and use of reservation land is necessarily taken from an Indian tribe when a federal flood control project, which is also used for recreational activities by all persons, is constructed on the reservation." *Lower Brule*, 711 F.2d at 826. In such a situation, any tribal power to regulate non-Indians on the taken lands must come from inherent sovereign authority.

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II. INHERENT SOVEREIGN AUTHORITY IS NOT A BASIS FOR TRIBAL REGULATORY AUTHORITY OVER NON-INDIAN HUNTING AND FISHING WITHIN THE AREA TAKEN BY THE UNITED STATES FOR DEVELOPMENT OF THE OAHE RESERVOIR.

If this Court determines that the Court of Appeals incorrectly applied the treaty-abrogation analysis to the facts of this case, it need not address the question of the nature of the Tribe's inherent sovereign authority over non-Indians within the lands taken by the Cheyenne River Act. The District Court found that the *Montana* exceptions did not apply under the facts of the case and that, consequently, the Tribe's sovereign authority was not a basis for regulatory authority over non-Indians on lands taken by the United States pursuant to the Cheyenne River Act or on lands taken from non-Indians pursuant to the Flood Control Act. The District Court's findings as to the nonapplication of the *Montana* exceptions, which are

entitled to deference unless clearly erroneous (*Anderson v. City of Bessemer City*, 470 U.S. 564, 573-74 (1985)), show unequivocally that no impairment of the Tribe's political integrity, economic security, or health or welfare had arisen by virtue of non-Indian hunting on all taken lands.⁴ Should this Court determine, however, that the Court of Appeals correctly applied the abrogation analysis with respect to lands taken under the Cheyenne River Act, the Tribe clearly lacks regulatory jurisdiction over lands taken under the Flood Control Act and the remand order below was improper.

The District Court's findings after trial concerning the second *Montana* exception were quite extensive. In part the district court determined: (1) "it does not appear that subsistence hunting and fishing is widely practiced by present Cheyenne River Sioux Indians" (Pet. App. at A-75); (2) "[t]ribal regulation of nonmember hunting on the taken area and nonmember fee lands is not necessary to protect hunting by tribal members for subsistence purposes" (id.); (3) "[t]he past subsistence needs of tribal members have been met despite nonmember hunting on the taken area and fee lands" (Pet. App. at A-77); (4) "[t]ribal regulation of nonmember fishing on the shoreline of the taken area is not necessary to protect fishing by tribal members for subsistence purposes" (id.); (5) "[g]enerally nonmembers hunting and fishing on the reservation have conducted themselves in a manner that does not threaten legitimate tribal concerns for livestock" (Pet. App. at A-78); and (6) "[i]n sum, the Tribe need not regulate the hunting and fishing activities of nonmembers on the taken area and the nonmember fee lands to protect its political integrity, economic security, or health or welfare" (Pet. App. at A-89). The District Court did not make any specific findings concerning the consensual-relationship exception, but no consent to tribal regulation appears to have existed as indicated by the trial court's ultimate conclusion that the Tribe lacked regulatory jurisdiction.

Approximately 18,000 acres of lands in the taken area were acquired from nonmembers under the Flood Control Act. The District Court considered this land, along with the land taken pursuant to the Cheyenne River Act, when making its determination that the Tribe's inherent authority did not provide a basis for regulatory jurisdiction over non-Indians. The Court of Appeals made the following comments in conjunction with its remand order:

Because the 18,000 acres within the taken area are in an "open" area, the analysis used by Justice White in his plurality opinion in *Brendale* should be applied to this acreage. According to Justice White's [*Brendale*] plurality opinion the 18,000 acres should be analyzed under the *Montana* standard. ... The District Court performed such an analysis of the taken area in whole, and found that neither of the exceptions to the general rule laid out in *Montana* applied. However, in light of our holding that the tribal defendants possess regulatory authority over the rest of the taken area, it would be appropriate for the District Court to again undertake a *Montana* analysis, limiting its inquiry to the 18,000 acres in question.

Bourland, 949 F.2d at 995 (Pet. App. at A-45 - A-46) (footnote omitted). The Court of Appeals misconstrued Justice White's plurality opinion in *Brendale*. The plurality opinion recognized the general principle that "regulation of 'the relations between an Indian tribe and nonmembers of the tribe' is necessarily inconsistent with a tribe's dependent status, and therefore tribal sovereignty over such matters of 'external relations' is divested. 492 U.S. at 427. It acknowledged the two possible exceptions to this general principle set forth in *Montana* but did not hold that the Tribe had a right to exercise regulatory

authority over any of the nonmember-owned lands at issue simply by meeting one of them. On the contrary, Justice White cautioned that the second *Montana* exception, prefaced by the word "may," indicates a "tribe's authority need not extend to *all* conduct that 'threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.'" *Id.* at 428-29 (emphasis supplied). His plurality opinion then stated:

The governing principle is that the tribe has no authority itself, by way of tribal ordinance or actions in the tribal courts, to regulate the use of fee land. The inquiry thus becomes whether and to what extent the tribe has a protectible interest in what activities are taking place on fee land within the reservation and, if it has such an interest, how it may be protected. Of course, under ordinary law, neighbors often have a protectible interest in what is occurring on adjoining property and may seek relief in an appropriate forum, judicial or otherwise.

Id. at 430. The plurality opinion went on to determine that a "protectible interest" arises when the impact on the tribe is "demonstrably serious" and "imperils the political integrity, economic security or the health and welfare of the tribe." Justice White's opinion thus used the language of the second *Montana* exception as a standard for determining the presence of a protectible interest arising under federal law rather than as a standard which, if found, always gives rise to tribal regulatory power.

While *Brendale* involved the exercise of tribal regulatory authority in a zoning context, there is no principled basis upon which to distinguish it factually or legally from this matter. Here, as there, a tribe seeks to

regulate conduct of nonmembers on lands which it no longer owns for the purpose of protecting tribal interests; here, as there, the form of regulation sought to be imposed is one unquestionably within a state's traditional police powers; and here, as there, the need for tribal regulation would be coextensive only with the duration of the allegedly harmful conduct. *Brendale*, 492 U.S. at 429-30 (White, J.). Under these circumstances, Justice White's plurality opinion indicates that a tribe has no civil regulatory or adjudicatory authority but, instead, must pursue available nontribal administrative or judicial remedies to vindicate its protectible interests. The plurality opinion's reasoning forecloses any viable claim of tribal regulatory jurisdiction over non-Indian hunting and fishing on lands taken under the Flood Control Act.

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CONCLUSION

The *amici curiae* States respectfully request that the Court of Appeals' judgment be reversed.

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OCTOBER TERM, 1992

STATE OF SOUTH DAKOTA IN ITS OWN
BEHALF, AND AS PARENS PATRIAE,
Petitioner,

v.

GREGG BOURLAND, PERSONALLY AND AS CHAIRMAN OF
THE CHEYENNE RIVER SIOUX TRIBE AND DENNIS ROUS-
SEAU, PERSONALLY AND AS DIRECTOR OF CHEYENNE
RIVER SIOUX TRIBE GAME, FISH AND PARKS,
Respondents.

**On Writ of Certiorari to the
United States Court of Appeals
for the Eighth Circuit**

**BRIEF FOR CORSON COUNTY AND LYMAN
COUNTY, SOUTH DAKOTA, AS AMICI CURIAE
IN SUPPORT OF PETITIONER**

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INTEREST OF AMICI CURIAE

Amicus Corson County is located on the west side of the Missouri River in northern South Dakota. The county contains the South Dakota portion of the original Standing Rock Sioux Reservation.¹ There is a taken area in Corson County similar to the taken area in this case,

¹ See *Solem v. Bartlett*, 465 U.S. 463, 472, n.14 (1984).

created by the Standing Rock Oahe Act, Pub. L. No. 85-915, 72 Stat. 1762 (1958).²

Amicus Lyman County is located in south central South Dakota, again on the west side of the Missouri River. The bulk of the Lower Brule Sioux Reservation lies within the northwestern corner of Lyman County. This reservation, as well, has a taken area, the result of two acts: the Fort Randall (Lower Brule) Act, Pub. L. No. 85-923, 72 Stat. 1773 (1958), and the Big Bend (Lower Brule) Act, Pub. L. No. 87-734, 76 Stat. 698 (1962).

Both counties have been subject to the General Allotment Act of 1887, 24 Stat. 388, and subsequent individual land acts.³ As a result, there is an extensive non-member population and land holdings in these counties.

Further, hunting and fishing jurisdiction in Lyman County has been the subject of extensive litigation in *Lower Brule Sioux Tribe v. State of South Dakota*, 711 F.2d 809 (8th Cir. 1983) *cert. denied*, 464 U.S. 1042 (1984). This litigation has since been recommenced, *Lower Brule Sioux Tribe v. State of South Dakota, et al.*, No. 91-3036 (D.S.D. filed October 1991), but is being held in abeyance pending this Court's decision in this case. Although Respondents in *Bourland* did not appeal that portion of the District Court opinion holding that the Tribe did not have authority to regulate non-Indian hunting and fishing on non-Indian owned fee land,⁴ the Lower Brule Sioux Tribe, ignoring *Montana v. United States*, 450 U.S. 544 (1981), is alleging they do have the power to regulate all non-Indian hunting and fishing on privately and publicly held fee lands within the boundaries of their reservation.

² *State of South Dakota v. Bourland*, 949 F.2d 984, 988, n.10 (8th Cir. 1991).

³ See, e.g., *Montana v. United States*, 450 U.S. 544 (1981).

⁴ *Bourland*, 949 F.2d at 989, n.11.

Amici Counties are interested in seeing law implemented which can realistically be put into operation. The holding of the Court of Appeals only further complicates an already complex situation. The law needs to be consistent, fair, and provide realistic solutions to the complex problems encompassing these areas. County law enforcement and prosecutorial officials need to know what power they have to enforce their laws. Residents of the counties and others who are not tribal members need to know with certainty the jurisdiction they enter and when they venture into and out of the taken area. Finally, *amici* Counties view this case as an opportunity for the Court to reaffirm its prior rulings in the area of tribal civil regulation over land not owned by the Tribe or tribal members.

SUMMARY OF ARGUMENT

Based on this Court's previous holdings, the Cheyenne River Sioux Tribe and Respondent tribal officials do not have jurisdiction to regulate non-member hunting and fishing in the taken area along the Missouri River, since they no longer have power to exclude non-members from that area.

ARGUMENT

1. The theory behind the opinion below that the Cheyenne River Sioux Tribe never lost its right to control and regulate non-member hunting and fishing in the taken area is that the treaty right to have the exclusive control over the land, and thus control all hunting and fishing, has not been expressly relinquished by the Tribe or expressly modified by Congress.

The 1868 Fort Laramie Treaty, 15 Stat. 635, granted the Sioux the exclusive right to use and control their lands.⁵ Although not specifically mentioned in the treaty, "arguably" implicit in this right was the right to control

⁵ The Yakima Indian Tribe had the same treaty language with the United States, see *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*, 492 U.S. 408, 415, n.1 (1989).

hunting and fishing on these lands. *State of South Dakota v. Bourland*, 949 F.2d 984, 991 (8th Cir. 1991), *Lower Brule Sioux Tribe v. State of South Dakota*, 711 F.2d 809, 814 (8th Cir. 1983), *cert. denied*, 464 U.S. 1042 (1984). This Court said almost the same thing in *Montana*, in commenting on similar language in the 1868 Fort Laramie Treaty with the Crow Tribe, 15 Stat. 649, when it stated:

The treaty, therefore, obligated the United States to prohibit most non-Indians from residing on or passing through reservation lands used and occupied by the Tribe, and, thereby, *arguably* conferred upon the Tribe the authority to control fishing and hunting on those lands.

450 U.S. at 558-559 (emphasis added). See, Brief for Petitioner, 14-17.

The right that both the Crow Tribe and the Cheyenne River Sioux Tribe have to regulate non-member hunting and fishing thus arguably comes from their power to exclude non-members from tribal lands. But this Court, in *Montana*, went on to recognize that power is limited.

But that authority could only extend to land on which the Tribe exercised "absolute and undisturbed use and occupation." And it is clear that the quantity of such land was substantially reduced by the allotment and alienation of tribal lands as a result of the passage of the General Allotment Act of 1887, 24 Stat. 388. . . . If the 1868 treaty created tribal power to restrict or prohibit non-Indian hunting and fishing on the reservation, that power cannot apply to lands held in fee by non-Indians.

Montana, 450 U.S. at 559.

This Court had further occasion to discuss the regulatory powers of Indian Tribes in *Brendale v. Confederated Tribes and Bands of the Yakima Nation*, 492 U.S. 408 (1989). The plurality opinion clearly states:

Meanwhile, *Montana* is directly to the contrary: the Court there flatly rejected the existence of a power, derived from the power to exclude, to regulate activities on lands from which tribes can no longer exclude nonmembers.

Brendale, 492 U.S. at 424 (White, J., plurality opinion). (The opinion of Justice Blackmun traces the development of this area of law and highlights the differences in the *Brendale* opinions. See *Brendale*, 492 U.S. at 448-468 (Blackmun, J., concurring in the judgment and dissenting)).

Further, in the dissent in *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982), Justice Stevens aptly described *Montana* in the following manner:

In *Montana v. United States*, *supra*, the Court held that the Crow Tribe could not prohibit hunting and fishing by nonmembers *on reservation land no longer owned by the Tribe*, and indicated that the principle underlying *Oliphant*—that tribes possess limited power over nonmembers—was applicable in a civil as well as a criminal context. As stated by the Court, "[t]hrough *Oliphant* only determined inherent tribal authority in criminal matters, the principles on which it relied support the general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." *Montana v. United States*, *supra*, at 565 (footnote omitted).

Merrion, 455 U.S. at 171-172 (Stevens, J., dissenting) (footnotes omitted) (emphasis added).

The logical result of this Court's teaching in *Montana* and *Brendale* is if a tribe no longer has the right to exclusively occupy and limit or prohibit non-member access onto land, they then have lost their civil regulatory powers over that land. The Court of Appeals, in its opinion, however, disagrees. The Court of Appeals went further to compare the policies underlying the General

Allotment Act with the legislation authorizing the construction of the Missouri River dams. The opinion then states:

It is obvious then, that the Cheyenne River Act was not a simple conveyance of the land and all attendant interests in the land. Significant portions of the "bundle of property rights" explicitly were reserved to the Tribe. The purpose of the Act, unlike that of the Allotment Act at issue in *Montana*, was not the destruction of tribal self-government, but was only to acquire the property rights necessary to construct and operate the Oahe Dam and Reservoir.

Bourland, 949 F.2d at 993.

The Court of Appeals then concluded, based what it incorrectly deemed to be different Congressional intent, that the Tribe's right to control non-member hunting and fishing in the taken area had not been eliminated. Even assuming different Congressional intent, that is beside the point. The one thing which did not survive the sale of the 104,000 acres by the Cheyenne River Sioux Tribe to the federal government was the Tribe's right to exclude non-members from that land. Even this fact was recognized in *Bourland*:

This is not to say, however, that the Tribe is free entirely to exclude non-Indians from hunting and fishing on the portion of the taken land over which it has control. The Tribe's "right to hunt and fish in and on the [Oahe Dam] shoreline and reservoir [is] subject, however, to regulations governing the corresponding use by other citizens of the United States." Cheyenne River Act, 68 Stat. 1193. Further, Section Four of the Flood Control Act requires that the "water areas of all such projects shall be open to public use generally." 16 U.S.C. § 460d. It appears then, that the Tribe may not enact a flat ban on non-Indian hunting or fishing on the portion of the taken area subject to tribal jurisdiction, nor may it impose unreasonably discriminatory limits on such activities.

949 F.2d at 995 (emphasis added).

This conclusion flies in the face of the rulings of *Montana* and *Brendale*. The Tribe's power to regulate hunting and fishing comes from its power to exclude the non-member hunter or fisherman from the land. Congress expressly took that power away from the Tribe in the Flood Control Act and the Cheyenne River Act. Consequently, the Tribe lost any treaty-based right to regulate non-Indian hunting and fishing in the taken area when it sold the land to the federal government.

Montana and *Brendale* also arguably indicate that the Tribe may have a right to regulate the hunting and fishing of non-Indians within the taken area pursuant to its "inherent tribal sovereignty". However, as the Court of Appeals recognized:

The District Court performed such an analysis of the taken area in whole, and found that neither of the exceptions to the general rule laid out in *Montana* applied.

Bourland, 949 F.2d at 995. Moreover, the plurality opinion in *Brendale* appropriately limited even this *Montana* exception. See Brief for Petitioner, 19-21.

Consequently, the Tribe has no power to regulate hunting and fishing of non-members within the taken area on this reservation.

2. In the final analysis, the Court of Appeals simply missed its usual way in this instance and it was helped along by the United States. *Amici* would be remiss if we neglected to mention the supporting role the United States has played in this process in the Eighth Circuit and in this Court.

Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978), *Montana*, *Brendale*, and *Duro v. Reina*, 495 U.S. 676 (1990), reflect historical arguments and documentation that this Court found authoritative and persuasive. Importantly, the United States, advocating tribal territorial sovereignty on behalf of its constituent agen-

cies, formally resisted and rejected every argument of substance in each case (except *Brendale*) until this Court announced its Opinion. Even then, the United States acknowledged only the most narrow application, while renewing all remaining arguments in related litigation then pending, as it has here. Brief for the United States, *Amicus Curiae, State of South Dakota v. Bourland*, 949 F.2d 984 (8th Cir. 1991).

In the process, longstanding views of other constituent agencies expressly in conflict with this tribal territorial sovereignty agenda are too often simply ignored by the United States. For example, in this instance the past position of the Army Corps of Engineers clearly supports Petitioner, but it received little, if any, consideration in the Court of Appeals. Brief for Petitioner at 45-47. Yet, for decades the position of the Army Corps of Engineers has been relied on by the general public, by the Tribes, by *Amici*, by Petitioner, and presumably by Congress. Brief for Petitioner at 45-47. *Amici* would respectfully submit that this is the background and these are the considerations that should be borne in mind when the Solicitor General expresses the views of the United States in this case.

CONCLUSION

The judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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FORT BERTHOLD RESERVATION
IN SUPPORT OF RESPONDENTS**

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INTEREST OF AMICI CURIAE

The Standing Rock Sioux Tribe, the Lower Brule Sioux Tribe and the Three Affiliated Tribes of the Fort Berthold Reservation are federally recognized Indian Tribes with Reservations along the Missouri River. *Amici* Tribes were subject to specific congressional enactments under which the United States purchased Indian lands for Missouri River flood control projects. Act of September 2, 1958, 72 Stat. 1762 (Standing Rock); Act of September 2, 1958, 72 Stat. 1773 (Lower Brule); Act of

October 3, 1962, 76 Stat. 698 (Lower Brule); Act of October 29, 1949, 63 Stat. 1026 (Fort Berthold).

SUMMARY OF ARGUMENT

This Court's decisions in *Montana v. United States*, 450 U.S. 544 (1981) and *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*, 492 U.S. 408 (1989) do not hold that tribes are automatically divested of all civil regulatory authority over non-Indians whenever Congress converts reservation trust lands into fee ownership. *Montana* and *Brendale* examined the intent of Congress in the General Allotment Act and subsequent statutes under which large portions of selected Indian reservations were sold to homesteaders who became permanent residents of reservation lands they entered. South Dakota's argument that *Montana* and *Brendale* create a *per se* rule barring all tribal civil jurisdiction over non-Indians on all reservation fee lands—without regard to the intent of Congress in the specific statute under which the lands left trust status—must be rejected. In each instance, the intent of Congress must be considered and controls. Examination of that congressional intent, moreover, proceeds in accordance with the principle that a statute will not be construed to abrogate or modify tribal treaty rights where it can be construed to preserve those rights. *E.g.*, *County of Yakima v. Yakima Nation*, 502 U.S. —, 116 L.Ed.2d 687, 704 (1992).

This case involves not an allotment act but the Cheyenne River Taking Act of September 3, 1954, 68 Stat. 1191. Its limited purpose was to secure title to the United States to reservation lands needed for a federal flood control project. Unlike the General Allotment Act, the Cheyenne River Taking Act contained no invitation to non-Indians to settle permanently the lands being taken from the Indians. Tribal rights to hunt and fish, prospect for minerals and graze on the lands taken by the United

States were specifically preserved in the Act, as were aspects of tribal governmental authority. While the Act provides certain limits on these tribal rights—including overriding federal authority to impose regulations and a provision allowing non-Indians to enter the reservoir temporarily to hunt and fish—it otherwise provides for retention of tribal authority over hunting and fishing by non-Indians in the reservation lands subject to the Act.

ARGUMENT

The issue in this case is whether a Tribe has civil regulatory authority over hunting and fishing by non-Indians on lands within its Reservation purchased by the United States under a special statute with a limited purpose—to provide the United States with title to Indian lands necessary for a federal flood control project. Act of September 3, 1954, c. 1260, 68 Stat. 1191 (hereafter “Cheyenne River Taking Act” or “Taking Act”). It is uncontested that the lands at issue are on the Cheyenne River Sioux Reservation, and that the Tribe has jurisdiction over hunting and fishing by its own members on those lands.¹ The Tribe is not claiming an absolute right to bar non-Indians from the lands at issue, or even exclusive jurisdiction to regulate hunting and fishing activities.² At issue here is whether the Taking Act—under

¹ *South Dakota v. Bourland*, 949 F.2d 984, 990 (8th Cir. 1991); see also Petitioner's Brief (hereafter “Pet. Br.”) p. 9 n.4 (State did not appeal District Court ruling that the Cheyenne River Taking Act did not diminish the Reservation); see also *Lower Brule Sioux Tribe v. South Dakota*, 711 F.2d 809, 821 (8th Cir. 1983), cert. denied, 464 U.S. 1042 (1984) (similar Taking Acts did not diminish Lower Brule Sioux Reservation; State has no jurisdiction to regulate Indian hunting and fishing on those lands).

² The Cheyenne River Taking Act authorizes the Secretary of the Army to “enact and enforce regulations to safeguard the projects.” *Lower Brule Sioux Tribe v. South Dakota*, 711 F.2d 809, 825 (8th Cir. 1983), cert. denied, 464 U.S. 1042 (1984). The issue of possible State concurrent jurisdiction was not presented to or decided by

which the United States purchased lands as to which the Tribe retained a considerable measure of rights—silently divested the Tribe of regulatory authority over non-Indian hunting and fishing on lands purchased under the Act.³

At the heart of this case are competing views of the reach of this Court's decisions in *Montana v. United States*, 450 U.S. 544 (1981) (hereafter "*Montana*"), and *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*, 492 U.S. 408 (1989) (hereafter "*Brendale*"). South Dakota reads *Montana* and *Brendale* as absolutely barring all tribal civil regulatory jurisdiction over non-Indians on *any* nontrust reservation lands—irrespective of the intent of Congress in the statutes under which the particular lands at issue left trust status, and irrespective of the nature and scope of the tribal regulation or the circumstances surrounding it.⁴ Under South Dakota's formulation, a court reviewing a challenge to a tribal assertion of jurisdiction over non-Indians need only check the title to the land under consideration—and if it finds the lands to be in fee rather than trust status, any tribal assertion of civil regulatory jurisdiction must be rejected.

Amici submit that South Dakota's broadside approach misreads *Montana* and *Brendale*. Those cases do not sanction the imposition of a judge-made rule that tribal jurisdiction is completely divested as to non-Indians on

the Court of Appeals in this case. *South Dakota v. Bourland*, 949 F.2d at 990 n.13.

³ *Amici* do not address the issue of the lands—approximately 18,000 acres—which were acquired by the United States from non-Indians. This brief focuses on lands—approximately 10,500 acres—which were subject to the Cheyenne River Taking Act.

⁴ South Dakota would acknowledge tribal jurisdiction over non-Indians on nontrust lands only where the non-Indians consent or where Congress specifically delegates such jurisdiction to a tribe. Pet. Br. p. 21 n.13.

all nontrust lands, as South Dakota urges.⁶ Rather, they teach that the intent of Congress governs, and each statutory scheme must be separately considered. *Montana* and *Brendale* followed this analysis by examining the unique policy in the 1887 General Allotment Act. *Montana* and *Brendale* do not dictate a "bright line" or *per se* rule as to every circumstance where a tribe asserts any regulatory jurisdiction over non-Indians who temporarily enter reservation fee lands. In fact, in conformity with well established principles of federal Indian law, such a *per se* rule was recently rejected by this Court's unanimous decision in *National Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845, 853-56 (1985) ("existence and extent of . . . tribal . . . [civil] jurisdiction will require careful examination"; *per se* rule of *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978) does not apply to civil regulatory jurisdiction over non-Indians).

I. EXAMINATION OF CONGRESSIONAL INTENT IS REQUIRED HERE.

The governing standard—that divestiture of tribal rights turns on the intent of Congress in the specific

⁶ *Montana* and *Brendale* recognized that tribal jurisdiction over non-Indians on fee lands may exist under certain circumstances. In *Montana*, the Court stated that tribes may have jurisdiction over non-Indians on fee lands which were subject to the Allotment Act in two circumstances: (1) where non-Indians enter "consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements" or (2) where non-Indian conduct on fee lands "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." 450 U.S. at 565-566.

In *Brendale*, Justice White's opinion clarified that the second *Montana* exception does not apply in every case, but rather "depends on the circumstances." 492 U.S. at 429. And, Justice Stevens' opinion in *Brendale* acknowledged that the power to exclude others was logically distinct from the power to regulate—and found circumstances in the closed area of the Yakima Reservation in which the latter power survived although the former did not. *Id.* at 433, 444.

statute at issue—is demonstrated by this Court's recent jurisprudence in the reservation disestablishment cases. Each disestablishment case has a set of basic circumstances in common—each involves a reservation as to which a tribe has been promised exclusive use and occupancy, and in each the reservation has been subject to allotment and the opening of surplus lands to non-Indian homesteaders under an allotment era statute. Despite these similarities, this Court has rejected sweeping, judge-made rules, insisting instead that the particular congressional intent in each case must be controlling. As the Court's unanimous opinion in the Cheyenne River disestablishment case states:

Although the Congresses that passed the surplus land Acts anticipated the imminent demise of the reservation and, in fact, passed the Acts partially to facilitate the process, we have never been willing to extrapolate from this expectation a specific congressional purpose of diminishing reservations with the passage of every surplus land Act. Rather, it is settled law that some surplus land Acts diminished reservations, *see, e.g., Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977); *DeCoteau v. District County Court*, 420 U.S. 425 (1975), and other surplus land Acts did not, *see, e.g., Mattz v. Arnett*, 412 U.S. 481 (1973); *Seymour v. Superintendent*, 368 U.S. 351 (1962). The effect of any given surplus land Act depends on the language of the Act and the circumstances underlying its passage.

Solem v. Bartlett, 465 U.S. 463, 468-69 (1984).

Beyond requiring an inquiry into the intent of Congress in the specific enactment at issue, this Court has also imposed prudential safeguards against congressional action unintentionally divesting tribal rights. While the formulations vary somewhat, the essential principle is that tribal rights are not lost unless Congress clearly provides for such loss. *E.g., United States v. Santa Fe Pac. R. Co.*, 314 U.S. 339, 353 (1941) (tribal title not extinguished absent "clear and plain" congressional intent); *Choate*

v. Trapp, 224 U.S. 665, 675-676 (1912) (taxability of Indian lands, "doubtful expressions" in the statute must be resolved in favor of the Indians); *Menominee Tribe v. United States*, 391 U.S. 404, 413 (1968) (intent of Congress to abrogate tribal hunting and fishing rights would not be "lightly imputed to the Congress"); *Solem v. Bartlett*, 465 U.S. 463, 472 (1984) (diminishment of reservation boundaries requires "substantial and compelling evidence of congressional intention. . ."); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 149 (1982) (tribal taxing authority over non-Indians not divested absent "clear indications" that Congress so intended).⁶ As Justice Scalia recently wrote for the Court:

When we are faced with . . . two possible constructions, our choice between them must be dictated by a principle deeply rooted in this Court's Indian jurisprudence: "statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit."

County of Yakima v. Yakima Nation, 502 U.S. —, 116 L.Ed.2d at 704, quoting *Montana v. Blackfeet Tribe*, 471 U.S. 759, 766 (1985).

South Dakota seeks to have this Court ignore these principles and, without examination of the Taking Act, to hold that *Montana* and *Brendale* compel a finding that the Tribe lacks any civil jurisdiction over non-Indian hunting and fishing on Taking Area lands. *Amici* urge this Court to preserve its traditional deference to the intent of Congress and not to supplant it with a broad, judge-made rule. Examination of the fundamental differences in congressional intent in the Allotment Act

⁶ Contrary to South Dakota's contention, Pet. Br., pp. 35-37, the "clear intent" rule applies to cases involving tribal governmental authority, as well as those involving individual exercise of treaty rights. *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 149 (1982).

from its intent in the Taking Act demonstrates why South Dakota's proposed *per se* rule should be rejected.

II. THE ALLOTMENT ACT AND THE TAKING ACT WERE FUNDAMENTALLY DIFFERENT STATUTES, REFLECTING DISSIMILAR CONGRESSIONAL INTENT.

A. Congressional Intent in the Allotment Policy Was Unique.

Federal Indian policy has vacillated widely over the course of more than two centuries—at certain times seeking to protect tribes in their rights and dealings, and at others seeking to divest the tribes of their lands and foster assimilation of Indians into the American melting pot.⁷ Among the various policies implemented by Congress, allotment was unique. While there were many policies which were designed to take Indian lands, only allotment expressly offered former Indian lands to non-Indians who agreed to homestead those lands, or purchased or inherited them from individual allottees under the statutory scheme.

This aspect of allotment—the promises expressly and implicitly made by Congress to the non-Indians who permanently settled the reservations under the terms of an allotment act—sharply distinguishes allotment from other federal Indian policies. And this aspect of allotment provides a clear explanation of *Montana* and *Brendale*: in inducing non-Indians to settle on Indian reservations, Congress did not intend in the allotment acts for those non-Indians to be subject to comprehensive tribal authority on their own lands. This, we submit, is what the Court had in mind when it stated in *Montana* that “[i]t defies common sense to suppose that Congress would intend that non-Indians purchasing allotted lands would become subject to tribal jurisdiction when an avowed

⁷ See generally F. Prucha, *The Great Father* (1984).

purpose of the allotment policy was the ultimate destruction of tribal government.” *Montana*, 450 U.S. at 559 n.9.

The General Allotment Act of 1887 worked a vast change in federal Indian policy. Throughout most of the 19th century, federal policy centered on entering treaties, seeking peace and the cession of tribal lands, and establishing, in return, Indian reservations which were to be permanent, inviolate homelands for the tribes. But this policy of establishing separate, albeit reduced, areas for the tribes came under attack essentially from its inception. By the late 19th century, “the prevailing national policy of segregating lands for the exclusive use and control of the Indian tribes gave way to a policy of allotting those lands to tribe members individually.” *County of Yakima v. Yakima Nation*, 502 U.S. —, 116 L.Ed.2d 687, 695 (1992).

The allotment policy arose from two rather distinct notions. On the one hand, allotment was supported by the philanthropists of the day, who thought that breaking up tribal landholdings into parcels held by individual Indians would “civilize the Indian.” Felix S. Cohen’s *Handbook of Federal Indian Law*, 132 (1982 ed.) (hereafter “Cohen”).

Humanitarian reformers were convinced that termination of tribal life was necessary if the Indian was to participate fully in the American system. Allotment was central to a civilization program because the difference in Indian and white concepts of property was considered fundamental. In general, reformers agreed that “the white man’s way was good and the Indian’s way was bad.”

Id. at 131-132, quoting D.S. Otis, *The Dawes Act and the Allotment of Indian Lands*, 9 (1973) (footnotes omitted).

On the other hand, as this Court has recognized, allotment was also a response to the “familiar forces” of non-Indians who wanted Indian lands. *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 590, 606, 609 (1977). In some cases,

the familiar forces were essentially the local non-Indians on the frontier adjacent to a reservation—the “nearby and growing population of white farmers, merchants, and railroad men . . . urging authorities in Washington to open the reservation to general settlement.” *DeCoteau v. District County Court*, 420 U.S. 425, 431 (1975). In others, the familiar forces were the general mass of non-Indians hungry for western lands. Overall, the “continuing demand for new lands for the waves of homesteaders moving west” was a powerful impetus, moving Congress to adopt the General Allotment Act, and the subsequent surplus land acts opening particular allotted reservations to non-Indian settlement. *Solem v. Bartlett*, 465 U.S. 463, 466 (1984).

These twin purposes of allotment—“civilizing the Indian” and providing land for homesteaders—were reflected in the two major components of the General Allotment Act itself. The Act authorized the President to divide tribal lands into allotments for individual Indians—160 acres for each head of a family. The allotments were to be held in trust by the United States and not subject to alienation for a period initially fixed at 25 years. General Allotment Act of February 8, 1887, c. 119, 24 Stat. 388; see also *Cohen* at 130-132.⁹

⁹ Supporters of allotment generally believed that settling whites among Indians would further the “civilizing” process. D.S. Otis wrote that

the Indian was to learn valuable lessons from his white neighbors. This sentiment was frequently repeated. An Indian agent wrote in 1885 that the land when opened “would soon be taken up, and these settlers would at once begin to open farms, and to set an example of thrift and self-support by the side of their Indian neighbors.”

D.S. Otis, *The Dawes Act and the Allotment of Indian Lands*, 17 (1973) (footnote omitted).

⁹ Under the 1906 Burke Act, c. 2348, 34 Stat. 182, 25 U.S.C. 349, Congress authorized the Secretary of Interior to issue patents in fee before the expiration of the 25 year trust period to Indians deemed to be “competent.” This led to involuntary issuance of

The General Allotment Act also authorized the purchase by the United States of all tribal lands remaining after the Indians received their allotments. The United States was authorized to dispose of these “surplus” lands to “actual settlers” and to issue patents to those taking the lands “for a homestead.” 24 Stat. 388, 390. Soon, this aspect of the allotment policy was being implemented “on a reservation-by-reservation basis” with individual surplus land acts covering particular reservations. *Solem v. Bartlett*, 465 U.S. at 467. In most of the later surplus land acts, the United States did not undertake to purchase the surplus lands at all—but instead simply opened the lands to purchase under the homestead, mineral and townsite laws, and acted as the “Tribe’s sales agent” in disposing of the lands to homesteaders. *Id.* at 473; see also *Seymour v. Superintendent*, 368 U.S. 351, 356 (1962).

Although the allotment policy proved a dismal failure in many respects and was reversed by Congress in 1934, it did succeed in its avowed goal of transferring Indian lands to non-Indian homesteaders.

The majority of Indian lands passed from native ownership under that allotment policy. Of the approximately 156 million acres of Indian lands in 1881, less than 105 million remained by 1890, and 78 million by 1900. Indian land holdings were reduced from 138 million in 1887 to 48 million in 1934. . .

Cohen at 138. As Theodore Roosevelt, who was President during a portion of the allotment era, tersely summarized it, “The General Allotment Act is a mighty pulverizing engine to break up the tribal mass.” C. Wilkinson, *American Indians, Time and the Law*, 19 (1987).

substantial numbers of fee patents to Indians. In this process “abuses were rampant” and substantial Indian lands were lost. *Nichols v. Rysavy*, 809 F.2d 1317, 1322 (8th Cir. 1989), quoting *Bordeaux v. Hunt*, 621 F. Supp. 637, 640 (D.S.D. 1985).

What sets allotment apart, then, is that in the allotment acts Congress promised and provided land to non-Indian settlers—at the same time it broke up tribal lands in an effort to bring about the ultimate destruction of tribal governments. The non-Indians, for their part, did not typically expect continued tribal governmental authority to pertain to their homesteaded lands.

Non-Indians often obtained Indian land through fraud or sharp dealing. Yet the fact remains that the United States invited its citizens to homestead Indian land and that non-Indians accordingly built homes and livelihoods within reservation boundaries. If many entered by means of illicit if not illegal transactions born of avarice, many others came simply in pursuit of honest dreams opened up by the homestead policy. . . . Doubtless there are cases where homesteaders were altogether oblivious of the fact that their new homes were within Indian reservations. These settlers came as families to open new land, not to do business with Indians.

C. Wilkinson, *American Indians, Time and the Law*, 22-23 (1987).

Those non-Indian expectations clashed with the tribes' expectations that the promises of the treaties with the United States would be honored and that their preexisting treaty-based governmental authority over the entire reservation would be preserved. *Montana* and *Brendale* addressed these conflicting sets of expectations, and held that the congressional intent with respect to allotment precludes comprehensive tribal regulatory authority over non-Indians on lands which they entered pursuant to the federal invitation.¹⁰

¹⁰ As noted in *Montana* and *Brendale*, exceptions exist with regard to tribal jurisdiction over non-Indians on fee lands which were subject to the Allotment Act. See n.5 *supra*.

B. Congress Enacted the Cheyenne River Taking Act To Obtain Title to Land for a Flood Control Project, Not To Provide Land to Non-Indians.

In contrast with the Allotment Act's broad intent to reshape federal Indian policy and relations between Indians and non-Indians nationwide, the Cheyenne River Taking Act had a single, limited federal purpose—to convey title to the United States of those particular Indian lands on the Cheyenne River Reservation "required by the United States for the reservoir to be created by the construction of the dam across the Missouri River in South Dakota now known as Oahe Dam. . . ." Taking Act, Section I.¹¹ In keeping with this limited purpose, in the Taking Act "[s]ignificant portions of the 'bundle of property rights' explicitly were reserved to the Tribe," 949 F.2d at 993, including the right to extract minerals (Section VI), the right to remove timber and salvage improvements (Section VII), the right to remain on the taken lands until the closure of the dam (Section IX), the right to graze livestock (Section X), and "the right of free access to the shoreline of the reservoir including the right to hunt and fish in and on the aforesaid shoreline and reservoir, subject, however, to regulations governing the corresponding use by other citizens of the United States." (Section X.)¹² These users, of course,

¹¹ The Taking Act was enacted after the policy of allotment came to "an abrupt end in 1934 with passage of the Indian Reorganization Act . . .", which returned "to the principles of tribal self-determination and self-governance which had characterized the pre-Dawes Act era. . . ." *County of Yakima v. Yakima Nation*, 502 U.S. at —, 116 L.Ed.2d at 696.

¹² This specific reservation of hunting and fishing rights should be construed in the context of contemporaneous enactments relating to such rights. In 1953, Congress enacted Public Law 280, providing a general authorization for states to assume jurisdiction over Indian country. Congress specifically withheld any transfer of jurisdiction regarding hunting and fishing—preserving Indian hunting and fishing rights. 18 U.S.C. 1162(b).

In 1960, Congress enacted a general statute prohibiting any person from trespassing on Indian lands by hunting or fishing without

were to enter the reservation temporarily for recreational purposes, not reside permanently upon it like the homesteaders under the allotment policy.

In addition, the Taking Act contained other provisions recognizing continued tribal governmental authority, including the right of the Tribal Council to select and designate the relocation of cemeteries (Section III), and the right of the Tribal Council to determine how to handle the removal of timber left by its individual Indian owners (Section VII). Moreover, the Taking Act provided that, in addition to payment for compensation for the taken lands, \$5.16 million would be placed in the Treasury for the Tribe to restore the "economic, social, religious and community life" of the Tribe—and this rehabilitation fund would be expended "upon the order and direction of the Tribal Council of said Tribe." (Section V.)

All of these provisions, preserving tribal property rights and recognizing tribal governmental authority, are in stark contrast with the allotment acts, under which Congress showed no such deference to the continuing vitality of tribes. South Dakota seeks to blur this sharp distinction by labeling the Taking Act as a termination act and contending that Congress' intent in termination acts, as in the allotment acts, was to eliminate tribal government. Pet. Br. pp. 31-33. But the relationship between allotment and termination is of no moment here. The Taking Act was clearly not a termination act. The comments of Congressman Berry relied on by South Dakota in this regard (Pet. Br. p. 32) reflect, at most, his notion

tribal authority. 18 U.S.C. 1165. The statute applies to trust lands and "lands of the United States that are reserved for Indian use, for the purpose of hunting, trapping, or fishing thereon . . ." *Id.* Unlike lands which are held in fee under an Allotment Act such as those in *Montana*, Taking Area lands—pursuant to Section X of the Taking Act—are "reserved for Indian use" for hunting and fishing. See also 16 U.S.C. 3372, 3371(c) (federal offense to take wildlife in violation of tribal law on *any* lands on an Indian Reservation).

of what might be desirable future legislation—not his understanding of the thrust of the Taking Act. Comparison of the Taking Act with an actual contemporaneous termination act—which South Dakota does not undertake in its brief—is instructive. For example, the key provisions of the Menominee Termination Act of June 17, 1954, c. 303, 68 Stat. 250, call for the per capita distribution of tribal funds to individual tribal members (Section 5); the end of federal responsibility for the supervision and services to the Tribe and its members regarding, *inter alia*, health, education, welfare, credit, roads, and law and order (Section 7); the transfer of lands held in trust by the United States to the Tribe (Section 8); an end to the application to members of the Tribe of federal statutes which apply to Indians (Section 10); and application of state law—"the laws of the several States shall apply to the tribe and its members in the same manner as they apply to other citizens or persons within their jurisdiction." (Section 10.)

The Taking Act, enacted the same year as the Menominee Termination Act, contains *none* of these provisions. To the contrary, the Taking Act and the Menominee Termination Act are fundamentally different in every respect. Most strikingly, the Menominee Termination Act reflects the express language Congress used when it intended state law to control. Furthermore, this Court has held that even the Menominee Termination Act—despite its broadly stated policies to remove federal protections and impose state law—did *not* abrogate tribal rights to hunt and fish free of state jurisdiction. *Menominee Tribe v. United States*, 391 U.S. 404 (1968).

The Taking Act was, in short, neither a termination act nor an allotment act. It did not end the federal responsibility to the Tribe or divide tribal funds among tribal members like a termination act. Most significantly, the Taking Act did not invite non-Indians to homestead former Indian lands, as the Allotment Act did, and thus

did not create the same expectations on the part of non-Indians or reflect the same congressional intent in that critical regard. As a result of these differences, unless congressional intent is to be ignored, *Montana* and *Brendale* do not dictate an outcome that the Taking Act by changing land title from trust to fee foreclosed all tribal authority over non-Indians.

III. THE CHEYENNE RIVER TAKING ACT DOES NOT DIVEST TRIBAL AUTHORITY TO REGULATE HUNTING AND FISHING ACTIVITIES BY NON-INDIANS IN THE OAHE TAKING AREA.

Like its position on *Montana* and *Brendale*, South Dakota's view of the Cheyenne River Taking Act is that it imposes an absolute bar with regard to *any* tribal authority to regulate non-Indian hunting and fishing on the Reservation lands subject to the Act. The Taking Act, on the contrary, expressly *preserved* a measure of the Tribe's hunting and fishing rights.

As South Dakota concedes (Pet. Br. p. 16), the 1868 Sioux Treaty, 15 Stat. 535, set apart the lands of the Great Sioux Reservation, including the lands now comprising the Cheyenne River Sioux Reservation, "for the absolute and undisturbed use and occupation" of the Sioux Tribes. Prior decisions of this Court teach that this treaty right included exclusive rights to hunt and fish, e.g., *Menominee Tribe v. United States*, 391 U.S. 404, 406 (1968) (treaty reserves rights to hunt and fish even though it does not specifically mention hunting and fishing rights); accord *Kimball v. Callahan*, 493 F.2d 564, 566 (9th Cir.), cert. denied, 419 U.S. 1019 (1974); *State v. Tinno*, 94 Idaho 759, 497 P.2d 1386 (1972). It is likewise clear that a tribe can regulate non-Indians the tribe might permit temporarily to enter reservation lands to hunt or fish. E.g., *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1983).

The 1954 Cheyenne River Taking Act contains an explicit recognition of the Tribe's "right of free access to

the shoreline of the reservoir including the right to hunt and fish in and on the aforesaid shoreline and reservoir, subject, however, to regulations governing corresponding use by other citizens of the United States." Taking Act, Section X. This provision "contemplates *reservation* of fishing and hunting rights by the Indians." H.R. Rep. No. 2484, 83rd Cong., 2d Sess. 10 (1954) (emphasis supplied).¹³ While payment for the loss of hunting and fishing rights—including the resulting revenues from permit fees—would have been required had those rights been extinguished, the Tribe was not paid for the taking of its treaty rights.¹⁴

¹³ South Dakota and its supporting *amici* rely on the last sentence of section 4 of the Flood Control Act of 1944, 58 Stat. 887, 889-890, codified as amended at 16 U.S.C. 460d, as implicitly conferring on the State exclusive regulatory control over Lake Oahe. (Pet. Br. p. 28) (Int'l Ass'n of Fish and Wildlife Agencies Br. p. 23.) The Court of Appeals for the Eighth Circuit has rejected this argument and has construed the 1944 Act as "creat[ing] a general scheme of federal, not state, regulation of the flood control projects. . ." *Lower Brule Sioux Tribe v. South Dakota*, 711 F.2d at 825. The entirety of section 4 supports this reading. It states in pertinent part:

The water areas of all such reservoirs shall be open to public use generally, without charge, for boating, swimming, bathing, fishing, and other recreational purposes, and ready access to and exit from such water areas along the shores of such reservoirs shall be maintained for general public use, *when such use is determined by the Secretary of War not to be contrary to the public interest, all under such rules and regulations as the Secretary of War may deem necessary. . . .* No use of any area to which this section applies shall be permitted which is inconsistent with the laws for the protection of fish and game of the State in which such area is situated.

16 U.S.C. 460d (emphasis added).

¹⁴ The Tribe was compensated for the *wildlife* which was to be actually destroyed by the flooding of Indian lands. This payment was for the destruction of animals that inhabited the lands adjoining the river whose habitat was destroyed, not for the loss of its treaty protected right to regulate hunting and fishing—and the commensurate right to raise revenues through the exercise of that right. H.R. Rep. No. 2484 at 4-6. See also *Lower Brule Sioux Tribe*,

During consideration of the bill which became the Taking Act, the Department of the Army opposed the provision which included the hunting and fishing language on the ground that "[s]uch a blanket provision would involve complications since there are numerous tracts within the reservation which are owned by non-Indians." *Id.* at 11. Presumably, the Army was referring to supposed jurisdictional "complications," in much the same fashion as South Dakota does here. Pet. Br. pp. 26-28. Significantly, Congress rejected the Army's comments and the measure was enacted, with the hunting and fishing provision intact, over the Army's objections.

The suggestion in this history of continued tribal rights regarding hunting and fishing is supported by the limited underlying federal purpose of the Taking Act—to purchase Indian lands for the Oahe project. The Act, as noted above, recognized the continuation of tribal governmental authority in several respects, and contains not a single mention of state authority. The Act also contains several provisions designed to minimize the adverse impact the flooding would have on the Tribe and its members. All this is consistent with construing the Act as preserving a measure of tribal authority over non-Indian hunting and fishing.

To be sure, the "corresponding use" language imposes limits on that tribal authority. That language prohibits the Tribe from excluding non-Indians from the Taking Area entirely, and it authorizes regulations by the Corps of Engineers as necessary to maintain and operate the Oahe project.¹⁵ But those express limitations do not re-

711 F.2d at 824 n.20 ("the legislative histories of the Big Bend and Fort Randall Acts indicate that the Lower Brule Sioux received no payment for the loss of hunting and fishing rights").

¹⁵ Regulation by the Corps of Engineers is consistent with the general scheme Congress provided in the 1944 Flood Control Act, see note 13 above, as well as with the acknowledgement of the regulatory authority of the Corps elsewhere in the Taking Act itself. Taking Act, Section VI.

quire a finding that the Act also implicitly removed all remaining tribal authority. The Taking Act did not abrogate the Tribe's treaty right in its entirety; it merely imposed what Congress viewed as necessary limitations on that right. As this Court said nearly a century ago in the context of a treaty fishing rights case:

New conditions came into existence, to which those rights had to be accommodated. Only a limitation of them, however, was necessary and intended, not a taking away.

United States v. Winans, 198 U.S. 371, 381 (1905).

The flaw in South Dakota's statutory argument is that it presents an "all or nothing" proposition—either all tribal rights were retained, or they were entirely lost. Nothing in the Taking Act or its legislative history supports such a construction. At most, the "corresponding use" language is subject to "two possible constructions" and therefore must "be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." *County of Yakima, supra*. In short, under this Court's established principles, the Taking Act must be construed as preserving—in a manner limited by overriding federal control—tribal hunting and fishing authority over non-Indians in the Taking Area.¹⁶

CONCLUSION

This Court has not previously construed the Cheyenne River Taking Act. It has, however, fixed the principles which should control consideration of the impact of that Act on the Tribe's authority over hunting and fishing on the affected lands. The key principle is that congressional intent controls and that tribal rights will not be deemed

¹⁶ The only issue here is whether the Tribe is precluded from exercising *any* hunting and fishing authority over non-Indians on Taking Area lands. The scope of the Tribe's retained authority—and the possibility of concurrent State authority over non-Indians—are not at issue here.

lost unless that intent is made clear. South Dakota urges the Court to avoid an inquiry into the intent of Congress with respect to the Taking Act, based on *Montana* and *Brendale*. But, as demonstrated above, there is simply no basis for imputing to the Congress which enacted the Taking Act the same intent with respect to jurisdiction which guided Congress 67 years earlier in adopting the General Allotment Act. Nor do *Montana* and *Brendale* counsel such a blatant disregard for congressional intent.

The Taking Act provides for retention of tribal regulatory authority over non-Indians on the affected lands, subject to federal regulations as needed to protect the Oahe project. The judgment of the Court of Appeals should be affirmed.

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